

TOUGH ON CRIME (ON THE STATE'S DIME): HOW VIOLENT CRIME DOES NOT DRIVE CALIFORNIA COUNTIES' INCARCERATION RATES—AND WHY IT SHOULD

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Abstract

California's prisons are dangerously and unconstitutionally overcrowded; as a result of the Supreme Court's recent decision in Plata v. Schwarzenegger, the state must act to reduce its prison population or face court-ordered prisoner releases. The state's plans to reduce overcrowding are centered around what it calls criminal justice "realignment", whereby California will send a portion of the state prison population to county facilities. The plan faces opposition from county officials, who see it as pushing the state's problem on to the counties.

But what if state prison overcrowding is really a county problem? I argue that state prison overcrowding is due in large part to county decisions about how to deal with crime. Using data from 2000-2009, I will show that California's counties use state prison resources at dramatically different rates, and, moreover, that the counties which use state prisons the most have below-average crime rates.

The contribution the Article makes, then, is twofold. First, it reinforces that incarceration in state prisons is one policy choice among many, not an inexorable reaction to violent crime. Counties can and do make different choices about how to respond to violent crime, including the extent to which they use prison. Second, the Article demonstrates why localities are crucial—and critically underexamined—contributors to state prison populations. Decisions are made at local levels about prosecution, investigation, plea bargaining, and sentencing, and these decisions are made by officials who are either elected locally (such as DA's, judges, and sheriffs) or appointed locally (police and probation officers). Local

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policies and policymakers affect the state's corrections budget, even though the state has no say in designing or implementing these policies. State officials must take these local differences into account, and create incentives for counties to behave differently.

The problem is that it is difficult to distinguish between justifiable, crime-driven incarceration and optional, policy-driven incarceration. I propose a new metric for distinguishing between these two types of incarceration, one which defines justified incarceration in terms of violent crime. This would allow the state to manage local usage of state prison resources without either penalizing crime-ridden areas or rewarding prison-happy ones.

This Article is the first of two articles dealing with the state/county prison relationship. While this Article quantifies the ways in which the extent of local prison admissions is not necessarily a function of the violent crime rate, a second Article will examine whether, given these differences, it makes sense for the state to subsidize county commitments to prison.

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INTRODUCTION

California's prisons are dangerously and unconstitutionally overcrowded.¹ The state must find a way to cut its prison population by tens of thousands of prisoners or it will be forced to release prisoners by the federal courts.² The state has long conceded that the conditions in its prisons violate the Eighth Amendment's prohibition on cruel and unusual punishment,³ but it has struggled to find ways to sufficiently reduce overcrowding.⁴ Earlier this year, the state passed AB 109, a bill which radically reconfigures the relationship between local governments and the state prison system.⁵ AB 109, Criminal Justice Alignment, will, once it is funded,⁶ shift many parts of the state prison system from the state level to

¹ Brown v. Plata, 563 U.S. ___, slip op. at *4-8 (2011).

² *Id.* at *2 ("[A]bsent compliance through new construction, out-of-state transfers, or other means ... the State will be required to release some number of prisoners before their full sentences have been served.").

³ *Id.* at *9.

⁴ *Id.* I note that the state reduced its prison population by 9,000 during the pendency of its appeal to the Supreme Court. *Id.* at *3.

⁵ Because the bill changes so many individual statutes, I have cited to the Legislative Counsel's Digest, available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_bill_20110404_chaptered.html.

⁶ The plan is currently in limbo, as Republicans and Democrats continue to fight over the state's budget deficit. See Don Thompson, California Law to Shift Inmates Hinges on Elusive Funds, Associated Press Apr. 4, 2011, available at http://www.mercurynews.com/news/ci_17775548?nclick_check=1.

the county level.⁷ Local reaction to the plan has been mixed. Localities want more control, but they do not want to foot the bill.⁸ Some members of the California assembly opposed to the plan see the overcrowding problem as a failure of state leadership, and fear that realignment will result in threats to public safety.⁹

But what if state prison overcrowding is really a county problem, and the state is simply returning the problem to the counties? Local officials, not state officials, control the inflow into prison, through decisions about which crimes to investigate, whom to arrest, and whom to prosecute. Juries are empanelled locally, and the judges who preside over the proceedings are elected locally. The only thing statewide about the prison system is that the state pays for it.¹⁰ Zimring and Hawkins famously referred to this as “the corrections free lunch” in their 1991 book, *The Scale of Imprisonment*.¹¹

⁷ The default punishment for felonies is now 16 months or 2-3 years in county jail; before AB 109, the default punishment was the 16 months or 2-3 years in state prison. *Id.* The bill will also transfer the state’s parole system to the counties.

⁸ See, e.g., Curt Hagman, Governor’s Plan: Early Release Disguised as Realignment, *San Bernardino County Sun*, May 7, 2011. (Author, a California Assemblyman, agrees that localities can do a better job than the state but argues that it will cost his county (San Bernardino) money.) See also Thompson, *supra* note 6 (citing California State Sheriff’s Association spokesman as saying the program is a “potential disaster” without guaranteed funding).

⁹ See, e.g., Shannon Grove, Taxpayers and Prisons, *The Daily Independent*, June 8, 2011 (Author is a California Assemblywoman).

¹⁰ In this Article, I am specifically using the word prison to mean the state prison system. This is not the only carceral option available, of course. Counties have jails, where they sentence offenders, process arrestees, and hold those who can’t make bail until trial.

¹¹ Franklin E. Zimring and Gordon Hawkins, *The Scale of Imprisonment* 211 (1979). In California, county revenues pay for public protection, which includes judicial expenditures (including trial courts, clerks, the District Attorney, and the Public Defender), police and sheriffs, and detention and corrections (adult and youth detention, probation). Some counties receive block grants from the state through a number of different programs, most prominently the Local Public Safety Fund (LPSF) and the Local Safety and Protection Account (LPSA). The LPSF is funded through a ½ cent sales tax. Cal. Const. Art. 13, § 35. Funds are distributed based on counties’ share of total state taxable sales. Cal.Gov.Code § 30052 (West 2011). The LPSA is funded through the vehicle license fund and, in turn, directs most of its funds to particular programs dealing with juvenile justice, law enforcement, and juvenile probation. Cal. State Ass’n of Counties, *Local Public Safety Funding Summary 2* (May 2009), available at: www.counties.org/images/.../CSAC-CSSA-CPOC%20FAQ_May%2018.pdf. Both the juvenile justice program and the law enforcement program make their disbursements

As the state seeks to manage its prison population, then, it must account for the potential policy distortions the prison subsidy creates. The difficulty is in distinguishing between incarceration that is, in some sense, justified by crime problems, and that which is the result of policy choices localities make about how to deal with that crime.

While several studies have explored the relationship between incarceration and crime, most have focused on the state and national level.¹² No study has focused on the ways in which county governments contribute to overpopulation in the adult prison system. An unpublished paper by Tuosto and Peckenpaugh suggested that policy differences might explain the differences in county commitments to the state Department of Juvenile Justice.¹³ A recent study looked at sentencing models in rural and urban areas of Nevada.¹⁴ The ACLU has also looked at California county

based on county population; the juvenile probation program allocations are fixed by statute. California Legislative Analyst's Office, *Judicial and Criminal Justice 2008-09 Analysis*, d-21-d-26, available at: http://www.lao.ca.gov/analysis_2008/crim_justice/crimjust_anl08.pdf. 37 counties also receive funds of equal amounts through the Small and Rural Sheriffs' Grants. Cal.Gov.Code § 30070 (West 2011).

I note that none of these disbursements is made on the basis of demonstrated financial need, nor are they made on the basis of a county's level of crime. One complicating point: County revenues themselves come in large part from the state (29.03%) and federal (17.30%) government, meaning that the division between state and county (and federal government and county) is complex. California State Controller, 2008-09 Counties Annual Report, iii, available at http://www.sco.ca.gov/Files-ARD-Local/LocRep/counties_reports_0809counties.pdf.

¹² Michael Tonry, in his 2004 survey of the existing research, considered several possible explanations for why the U.S. as a nation incarcerates at such a high rate relative to other countries, concluding that the high crime explanation "has virtually no validity." Michael Tonry, Thinking About Crime 27. (2004). Bruce Western comprehensively analyzed the commonly-provided causes of incarceration, ranging from politics to state sentencing, but he focused primarily on the state level as well. Bruce Western, Punishment and Inequality in America (2006). Western's compelling examination of crime and incarceration surveys research involving cities and neighborhoods, but his analysis does not focus on sub-state political units as political, policy-making entities. *Id.* at 36. His own comparison of murder and incarceration rates compares states to one another. *Id.* at 49. His analysis of politics, state penal laws, and the role of discretion in sentencing are all focused on the state level. *Id.* at 59-66.

¹³ On file with Author.

¹⁴ Victoria Springer et. al, Felony Sentencing in Rural and Urban Courts: Comparing Formal Legal and Substantive Political Models in the West, available at <http://ssrn.com/abstract=1441593>.

variations in the imposition of the death penalty.¹⁵ The California state Offender Information Services Branch broke down the population of second and third strikers by county and strike offense, but did so only for a single year and only for strike offenses.¹⁶ Twenty years after Zimring and Hawkins wrote that the correctional free lunch required “empirical and theoretical work which will both complicate and enrich the public choice model with special reference to decisions about imprisonment,”¹⁷ few studies have been produced. This Article and the one to follow will try to fill that gap.

California is a massive state, with roughly one tenth of the country’s population. Its prison population is nearly the same size as the population in the federal system. Los Angeles County alone has a population greater than all but eight states. Eight counties besides Los Angeles have more than a million people,¹⁸ a population larger than that of the smallest states. California is, therefore, a good place to start the analysis of the counties’ role in state prison overpopulation: the scale of California’s prisons—as well as the scale of its overcrowding—are of national import.

California can be thought of not only as a single state, but also as a collection of 58 counties. Counties are significant political entities in their own right, distinct from the state. Counties are run by their residents: there is no statewide politicking in local elections for Sheriff, or District Attorney, or county council, or judge. A California voter in one county has no say in how another county makes its criminal justice decisions.

The pair of Alameda and San Bernardino Counties presents perhaps the starker example of how these decisions can affect counties’ use of state prison resources. A ten-year average of county data (2000-09)

¹⁵ Romy Ganschow, Death by Geography: A County by County Analysis of the Road to Execution in California, 2008, available at http://www.aclunc.org/issues/criminal_justice/death_penalty/death_by_geography_a_county_by_county_analysis_of_the_road_to_execution.shtml.

¹⁶ Department of Corrections and Rehabilitation, Offender Information Services Branch, Second and Third Striker Felons in the Adult Institution Population, June 30, 2009, available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1/STRIKE1d0806.pdf.

¹⁷ Zimring and Hawkins, *supra* note X, at 215.

¹⁸ In alphabetical order: Alameda, Contra Costa, Orange, Riverside, Sacramento, San Bernardino, San Diego, and Santa Clara.

shown on the chart below indicates that both counties have similarly-sized populations, similar amounts of reported violent crime (criminal homicide, rape, robbery, and aggravated assault), similar amounts of reported property crime (burglary, motor vehicle theft, and larceny-theft over \$400), and similar amounts of all reported “Part I” crime (all of the above crimes plus larceny-theft under \$400 and arson).¹⁹ Overall crime rates are nearly identical: Alameda is a little more violent and San Bernardino is a little worse for property crime. Both counties are part of the same state, governed by the same penal code and state judicial system, yet ten-year averages of prison usage for that time show two radically different outcomes: San Bernardino’s prison population was more than twice as high, on average, as Alameda’s, and it sent an average of more than three times as many “new felons” to prison each year.

Table 1: Crime Comparison Between San Bernardino and Alameda Counties, Average Yearly Values 2000-2009

	San Bernardino	Alameda	Ratio of San Bernardino to Alameda
Total Population	1,923,360	1,506,740	1.28
Reported Violent Crime	9,956.6	10,629	.94
Reported Property Crime	38,762	36,072	1.07
All Reported Part I Crime	72,454	74,194	.98
Yearly Prison Population	11,441	4,555	2.51
Yearly New	3,792	1,088	3.49

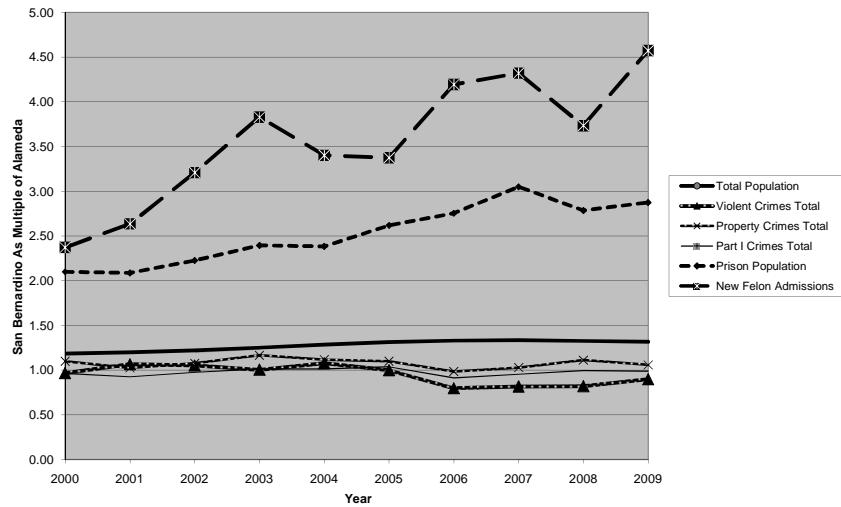
¹⁹ The Uniform Crime Reporting Program divides crimes into Part I and Part II. Part I crimes include criminal homicide, forcible rape, aggravated assault, burglary (breaking and entering), larceny-theft not of a motor vehicle, motor vehicle theft, and arson. U.S. Dept. of Justice, FBI, UCR Offense Definitions, available at <http://www.ucrdatatool.gov/offenses.cfm>. These offenses were chosen “because they are serious crimes, they occur with regularity in all areas of the country, and they are likely to be reported to police.” *Id.*

Felon Admissions			
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All figures are ten-year averages, 2000-2009.

The results of this comparison on a yearly basis are shown graphically in Figure 1. I calculated the yearly data as a ratio (San Bernardino to Alameda). As in the chart above, a ratio of one means the counties have equal numbers for that particular category, a ratio above one indicates the degree to which San Bernardino's numbers exceed Alameda's, and a ratio below one indicates the degree to which San Bernardino's numbers are lower than Alameda's. The chart clearly demonstrates that the year-to-year story is no different than that told by the ten-year average. During all ten years, San Bernardino had at least twice the prison population and more than twice the number of new felon admissions—sometimes much more—and it did so without suffering from any more crime than Alameda.

Figure 1: San Bernardino and Alameda Crime Rates and Prison Usage



These two counties, then, are almost identical in material ways when it comes to crime, but they are incredibly different when it comes to their usage of state prison resources. For new felon admissions alone, San Bernardino costs the state, on average, \$93,045,566 more each year than Alameda; its total prison population costs the state, on average, an extra \$236,761,677 each year. This is not a difference that can be explained by reference to reported crime rates. The state is paying for San Bernardino's decision to treat crime with prison, but Alameda—indeed,

any California citizen who does not live in San Bernardino—has no say in electing the people who design San Bernardino’s criminal justice policies. Why should the state pay for a decision only some of its citizens make, when residents of other counties make different decisions?

The most persuasive justification for the use of prison is that it is a response to crime; that is the argument I will primarily address in this paper. I assume for purposes of my analysis that crime rates are exogenous. Taking the “prison as a response to crime” argument at its strongest means assuming that counties do not (or cannot) breed crime through policy. I do not believe this is necessarily true, but I wish to cabin the scope of the Article.²⁰ I am also not arguing that prison should not be used to treat crime; I am simply saying that violent crime rates alone cannot explain the difference in usage. I specifically focus on violent crimes because all the dominant justifications for imprisonment—incapacitation, retribution, and deterrence—consider violent crimes to be the most worthy of incapacitation, the most deserving of punishment, and the most serious offenses to be deterred.²¹

My analysis starts with the proposition that the average of a state as large as California—and with a single county larger than all but eight states—smooths over very real differences, much like taking the per capita average income in a room with Bill Gates would also be misleading. While I do examine data at the statewide level, the bulk of my analysis will focus at the county level. This analysis shows that San Bernardino and Alameda are not anomalous: the state as a whole is divided among counties which persistently use prison resources at high rates and those which use prison at low rates. The group of counties with the highest usage of prison has, as a whole, below-average violent crime rates. They also have lower property and “Part I” crime rates as well. The argument that prison usage is driven by violent crime rates has no statistical support.

A. The Coverage Model

In this Article, I propose that violent crime rates should be driving the state’s willingness to pay for localities’ prison commitments. I divide the

²⁰ For the argument that prison is criminogenic, *see, e.g.*, Sharon Dolovich, Incarceration American-Style, 3 Harv. L. & Pol'y Rev. 237 (2009).

²¹ Some observers have argued that drug crimes might best be dealt with outside the criminal justice system entirely. There are no reported drug crimes, however.

state's counties into four segments, based on the relationship within each county between reported violent crime and the number of new felons it sends to prison. To measure this relationship, I define a new variable, the violent crime coverage rate. Coverage is the amount of new felon admissions (NFA)²² for a given county in a given year as a percentage of reported violent crime²³ for that county in the same year. Mathematically,

$$\text{Coverage}_{\text{countyyear}} = \text{NFA}_{\text{countyyear}} / (\text{Violent Crime}_{\text{countyyear}}).$$

A county with 100 reported violent crimes and 50 NFA would have a coverage rate of 50%. A county with 100 reported violent crimes and 10 NFA would have a coverage rate of 10%. Higher numbers indicate more carceral responses: for a given level of violent crime, a county with higher coverage sends a larger number of offenders to prison. Counties with lower numbers “cover” their violent crimes with fewer NFA.²⁴ Some variance might be explained by the types of violent crime—more murders, for example—and I will explore whether this is the case.²⁵

I focus on NFA, not total prison population, for a number of reasons. First, I find persuasive Stephen Raphael and Michael Stoll’s model of the total prison population: they model prison population as a function of admission rates, release rates, and the prison population the year before.²⁶

²² NFA measures admissions to prison of those convicted of a new crime, and, as such, is distinct from other parts of the prison population, most notably parolees returning to prison on either a “technical” parole violation (e.g. failed drug test) or a new crime (charged as a parole violation instead of, say, a burglary). NFAs describe new terms for new offenses; they do, of course, include recidivist prisoners who have been previously incarcerated.

²³ Reported violent crimes include homicide, rape, robbery, and aggravated assault.

²⁴ I note initially that coverage rates might be explained by a number of factors: higher clearance rates (more efficient law enforcement), more aggressive policing strategies (e.g. broken windows), or something to do with the seriousness of the particular offenses (e.g., those facts deserving of more serious punishment).

²⁵ My preliminary conclusion is that rates of each type of violent crime are lower in counties which use a lot of prison resources, and, moreover, that the more serious crimes, such as homicide, have too few cases to account for much of a difference.

²⁶ Stephen Raphael and Michael Stoll, Why Are So Many Americans in Prison?, in Raphael and Stoll (eds.), *Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom* 6 (2008). [Note: my pagination refers to the electronic copy available at http://www.law.berkeley.edu/files/why_are_so_many_americans_in_prison.pdf.]

Raphael and Stoll conclude that the increase in population is not due primarily to increases in crime, characterizing the rise in incarceration as a policy experiment. *Id.* at 65.

Though I believe this model to be a good one, it would be difficult to test empirically. Testing this model with my data would require me to isolate changes in sentences for particular classes of offenders (which affects time to release), the momentum effect of a large population, and the length of time to which new prisoners are sentenced. It would be difficult to tease out whether a county had a large population in a given year because there were a sizeable number of people from that county who remained in prison on long terms or because that county was sending more people to prison in the first place. Not only is the data difficult to obtain; it is harder still to determine whether a given sentence is justified or not. It is difficult enough to determine what constitutes a “real offense”; it is that much more difficult to determine the “real” sentence length of a given offense, as the U.S. Sentencing Commission has so often demonstrated.

NFA, instead, simply measures who enters prison from a given county, not how long they stay there. Its simplicity is not without its costs, however. It is, of course, possible that Low Use counties are nevertheless sending non-serious offenders to prison, and that High Use counties are sending only the most hardened criminals to prison. If that is the case, the method I have chosen will not account for that. However, the fact that the violent crime offense mix is no worse in High Use counties than in Low Use ones might indicate that this is unlikely.

In addition to using coverage in its own right, I also use it to calculate the prison subsidy a county receives or forgoes. I define the amount of necessary incarceration as violent crime in a county times the statewide coverage rate. That is, the state average is the “fair” amount of incarceration justified by a particular amount of violent crime; anything above that constitutes a local policy choice that is being subsidized with state funds. This is obviously a strong choice on my part, but it aligns with the thrust of my argument: that a county’s deviations from state policy should not be subsidized by the rest of the state. If a county makes different choices from the state as a whole, it should bear the cost of those burdens (and reap the benefits).

The statewide average, then, is a proxy for the amount of incarceration dictated by violent crime itself, not a county’s unique response to violent crime. Calculating subsidies in this way more closely ties prison usage to the justification for that usage, and differentiates between counties which **have** to use a lot of prison and those which **choose** to use a lot of prison.

I calculated the subsidy as follows. I used the state's coverage rate for a given year and multiplied it by the number of reported violent crimes in each county that year to determine the "crime justified" NFA. I then took the actual NFA numbers for a county and subtracted the "crime justified" number from it to arrive at that county's NFA surplus (or deficit). I then multiplied this surplus figure by the per capita prisoner cost to arrive at subsidy/deficit numbers. Mathematically,

$$\text{Subsidy}_{\text{countyyear}} = (\text{GrossNFA}_{\text{countyyear}} - (\text{Coverage}_{\text{stateyear}} * \text{Violent Crime}_{\text{countyyear}})) * \text{Per Capita Prison Cost}_{\text{stateyear}}$$

I emphasize that these subsidy figures are not, again, a measure of the total cost of prison.²⁷ This estimate only calculates the cost for the first year of imprisonment for new felons. Sentence lengths are undoubtedly an immense factor in determining the total cost of a county's use of state prisons. That is, a county with a below-coverage NFA number might nevertheless have higher costs because their felons stay in prison longer. (Of course, it could also be that counties with higher NFA rates also give longer sentences, in which case the subsidy numbers will be underweighted relative to the ultimate fiscal cost.) Nevertheless, I believe that the cost of NFA provides us with a useful entry point to see which counties benefit from prison subsidies and which counties are taxed by them.

B. Why Coverage Matters

If the violent crime to NFA relationship is not predictive at the state level, this raises two obvious questions: what might explain it, and why does this even matter? As to the first question, I consider a variety of explanations: other crimes, local law enforcement, politics, per capita income, and the use and type of in-county dispositions. My exploration of these subjects is, for space reasons, tentative, but I have posted my dataset online and encourage others to do more detailed analysis.

²⁷ We can easily get that number by multiplying the total numbers of prisoners from a given county by that year's cost per prisoner. That number, however, treats prison as a thing unto itself. Using coverage to calculate subsidies, however, accounts for the best reason for incarceration: violent crime. Incarceration at the statewide coverage rate is justified; anything else is surplus.

As for the significance of the analysis, I see three contributions. First, there are very real fiscal impacts to counties' usage of prison, ones which are not transparent enough in the present system. By controlling for the influence of violent crime, my estimation of the fiscal impacts is a closer representation of differences in policy among counties, policy choices which are subsidized by the unwilling residents of other counties. This Article is part of a two-part series which examines why states should subsidize state prisons when local officials decide who is sent there.²⁸ This Article will, I hope, dispel the idea that the level of prison usage in California is a necessary result of crime.

Using the coverage rate model of prison subsidy, I will show that some individual counties who make different policy choices—choices not dictated by the average response to violent crime—cost the state tens of millions of dollars a year, every year, while others leave tens of millions of dollars of prison resources on the table. I also explore what would happen if the entire state incarcerated at the coverage rate of the most carceral counties. I do this to raise a key question: if one county or set of counties is entitled to incarcerate at a given rate, why shouldn't other counties do so as well? And if the state can only afford to have some counties incarcerating greater numbers of people per violent crime, which ones get to do so, and on what basis? Ultimately, I am concerned with how residents of underincarcerating counties can rein in over-incarcerating counties in the present system, given that all citizens pay for prison equally through general state revenues, regardless of how heavily their counties use prison.

The second point is that state prison problems are not necessarily best addressed by statewide solutions. As this Article demonstrates, counties operating under the same set of laws and in the same court system get widely different results. Statewide solutions—such as changes to statutes, sentencing commissions, and the like—are almost always proposed as the means of addressing state prison overpopulation. But, because they fail to address the differences in local enforcement, they cannot effectively address the problem. In other words, without a correct diagnosis of the cause of state prison usage, solutions cannot cure the disease.²⁹

²⁸ See also Why Should States Pay For Prisons, When Local Officials Decide Who Goes There? Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871274.

²⁹ Franklin Zimring, in a recent article, observes that the huge growth in prison population during the 1970s and 1980s was not accompanied by any significant changes

Third, this analysis has important ramifications for the state's implementation of criminal justice realignment. The question of how much incarceration counties will be expected to deal with inside the county depends crucially on how California sets the baseline rate of how much state resources the county is permitted to use. The current plan is to set the baseline at current levels of prison usage. This would be a mistake, in my view, because it would make permanent the state subsidies of what appear to be policy choices. Just because a county has been using state prisons at a given rate does not mean that it had to. I propose, instead, that the state base prison usage on reported violent crime rates and the statewide violent-crime-to-new-felon-admission coverage rate. This would tie funding to need, rather than funding to use.

This Article proceeds in four parts. In Part I, I explain the sources and methods used for this Article. In Part II, I examine the relationship between crime and incarceration. In Part III, I examine other possible explanations for differences in county commitments to state prisons. In Part IV, I examine the fiscal implications of differences in incarceration rates, demonstrating that counties which incarcerate at a relatively greater rate are doing so at great cost to the state: that is, they are tough on crime on the state's dime. I conclude by discussing some potential policy implications this analysis has for the future of California criminal justice reform.

I. SOURCES, LIMITATIONS, AND METHODS OF THE STUDY

In this Section, I will discuss briefly how I conducted this study. I begin by describing the data sources used in this Article, all of which are made available online by the state. I then discuss some limitations with this study which might explain the results. I then discuss further the ways in which I subdivided the state on the basis of violent crime coverage rates

in state penal codes. Because of the discretion in the American system, however, "substantial changes in aggregate punishment policy can take place without any substantial change in the legislation governing the levels of punishment available or the choice of punishments in individual cases." Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. Crim. L. & Criminol. 1225, 1232 (2010).

and the calculated prison subsidy.

A. Sources

The state of California maintains several public databases available on the internet; it also publishes annual reports on the offender population incarcerated in the state's prison. The data I used in this analysis came from these sources and dates from 2000 to 2009. All data has been compiled into a single spreadsheet which I have made available online.³⁰ I will discuss sources for particular data, as well as changes to the data I made, where necessary to account for things such as the difference between calendar year and fiscal year reporting.

County population. The California Department of Justice uses estimates from the State Department of Finance to generate three potentially useful county population figures, divided by age: Total Population at Risk, (ages 10-69), Adult Population at Risk (ages 18-69), and Juvenile Population at Risk (ages 10-17).³¹ The term "at Risk" presumably refers to those people who are at greatest risk of becoming involved with the criminal justice system, either as juveniles or adults. I have used the Adult Population at Risk (APAR) figures throughout this Article and have calculated crime, arrest, and new felon admission rates using raw numbers and dividing by these population figures, normalizing per 100,000.³² I did so to avoid differences in rates that might stem from using different population types. The California Department of Finance

³⁰https://docs.google.com/leaf?id=0B5rP1OL_xn65MzYyYzVhYjMtNGZkNy00NW_E5LWEzNWy1ZTQ0YWQwNzRjYjcw&hl=en_US.

³¹ See, e.g., Cal. Dept. of Justice, Office of the Attorney General, Criminal Justice Statistics Center, Statistics by City and County, "Population Estimates, 2000, by County", Tbl. 27 (2000), available at http://stats.doj.ca.gov/cjsc_stats/prof00/00/27.pdf.

³² The entry page for the Criminal Justice Statistics Center is available at <http://ag.ca.gov/cjsc/datatabs.php>. Individual population reports are available at the following locations: [\(2000\)](http://stats.doj.ca.gov/cjsc_stats/prof00/00/27.pdf), [\(2001\)](http://stats.doj.ca.gov/cjsc_stats/prof01/00/27.pdf), [\(2002\)](http://stats.doj.ca.gov/cjsc_stats/prof02/00/27.pdf), [\(2003\)](http://stats.doj.ca.gov/cjsc_stats/prof03/00/27.pdf), [\(2004\)](http://stats.doj.ca.gov/cjsc_stats/prof04/00/27.pdf), [\(2005\)](http://stats.doj.ca.gov/cjsc_stats/prof05/00/27.pdf), [\(2006\)](http://stats.doj.ca.gov/cjsc_stats/prof06/00/27.pdf), [\(2007\)](http://stats.doj.ca.gov/cjsc_stats/prof07/00/27.pdf), [\(2008\)](http://stats.doj.ca.gov/cjsc_stats/prof08/00/27.pdf), [\(2009\)](http://stats.doj.ca.gov/cjsc_stats/prof09/00/27.pdf).

estimates the total adult population for each county as of July 1 of each year.³³ I have used total population figures to contrast with Adult Population at Risk only where noted. These figures do not include relevant information about population distribution—e.g., degree of urbanization—that might be relevant drivers of crime and/or carceral responses, nor do they include figures about racial and/or ethnic subpopulations within a given county, which might also be relevant. Department of Finance figures do, however, account for both legal residents and “unauthorized foreign immigrants.”³⁴

Prison Population by County, New Felon Admissions by County, and Parole Violators with a New Term by County. The California Department of Corrections and Rehabilitation publishes annual population reports on prisoners housed in state prisons. Each year, the state publishes the total population of prisoners by county of commitment as of December 31 of that year,³⁵ as well as yearly totals by county for new

³³ State of California, Department of Finance, California County Population Estimates and Components of Change by Year, July 1, 2000-2010. Sacramento, California, December 2010, available at <http://www.dof.ca.gov/research/demographic/reports/estimates/e-2/2000-10/view.php>.

³⁴ *Id.*

³⁵ The entry page for these reports is available at http://www.cdr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPrisArchive.html. The reports are authored by the Data Analysis Unit, Cal. Dep’t of Corr. & Rehab. and titled “California Prisoners & Parolees” followed by the year [hereinafter CDCR Population Report]. 2002 and 2001 reports contained data from the year prior; reports after 2004 contained data from that year. In 2003, the Data Analysis Unit combined two years’ worth of data into one report. Specifically, I used the following tables from the following annual reports: 2000 data came from the 2001 annual report at tbl. 10, available at http://www.cdr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2001.pdf; 2001 data come from the 2002 annual report at tbl. 10, available at http://www.cdr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2002.pdf; 2002 and 2003 data were both contained in a 2003 report, with 2002 data at tbl. 10 (pdf page 34) and 2003 data at tbl. 10 (pdf page 139), available at http://www.cdr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2003.pdf; 2004 data are at tbl. 10 of the 2004 report, available at http://www.cdr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2004.pdf; 2005 data are at tbl. 10 of the 2005 report, available at http://www.cdr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2005.pdf; 2006 data are at tbl. 10 of the 2006 report, available at http://www.cdr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf.

felon admissions and parole revocations.³⁶ I note that this population figure is taken in a different month (December) than the county population figures noted above (July), and that prison figures represent actual headcounts, while county population figures are estimated.

Crime and Arrest Figures; Probation and Jail Figures. I used Department of Justice published data for reported crimes,³⁷ felony arrests,³⁸ adult probation caseload,³⁹ and jail population figures.⁴⁰ As

[al/CalPris/CALPRISd2006.pdf](#); 2007 data are at tbl. 14 of the 2007 report, available at http://www.cdr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2007.pdf; 2008 data are at tbl. 14 of the 2008 report, available at http://www.cdr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2008.pdf; 2009 data are at tbl. 14 of the 2009 report, available at http://www.cdr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2009.pdf.

³⁶ This data is reported in the CDCR Population Reports, *supra* note 9, at tbl. 5A for the years 2000 and 2002-2006 and tbl. 15A for the years 2007-2009. 2000 data is in the 2001 report, 2002 data is in the 2002 report, and the 2003 report provides 2003 data in the second set of tables (tbl. 5A, pdf page 128). Thereafter the data for a given year are in that year's report.

2001 data was not given in any of the the annual reports. It was, instead, taken from Data and Analysis Unit, Dep't of Corr., Characteristics Of Felon New Admissions And Parole Violators Returned With A New Term, Calendar Year 2001 at tbl. 11 (Felon New Admissions) and tbl. 16 (Parole Violators Returned with New Term), available at http://www.cdr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/ACHAR1/ACHAR1d2001.pdf. The figures from tables 11 and 16 were added to arrive at total new admissions figures (calculated).

³⁷ The entry page for the Criminal Justice Statistics Center's county crimes data is available at <http://ag.ca.gov/cjsc/statisticsdatatabs/CrimeCo.php>. Individual county data was taken by following links to each county.

³⁸ The entry page for the Criminal Justice Statistics Center's county arrests data is available at <http://ag.ca.gov/cjsc/statisticsdatatabs/ArrestCoFel.php>. Individual county data was taken by following links to each county.

³⁹ The entry page for the Criminal Justice Statistics Center's adult probation data is available at <http://ag.ca.gov/cjsc/statisticsdatatabs/SuperCo.php>. Individual county data was taken by following links to each county. The data is incomplete: Contra Costa, Merced, Sacramento, Siskiyou, Tulare, and Yolo county did not report separate misdemeanor population counts. See Criminal Justice Statistics Center, Criminal Justice Trend Data Footnotes, available at http://stats.doj.ca.gov/cjsc_stats/prof09/footnotes.pdf. Mariposa County reported -47 people on the misdemeanor probation caseload for 2000, so I deleted all data from that year; the same is true for San Joaquin County for 2002, which reported a felony probation caseload of -423. Gaps in the data also crop up intermittently and are a result of no data being reported; they should not be read as zeroes.

⁴⁰ The reports for jail data are located at the same url in note 13, *supra*. Total figures might not add up due to projections and rounding of numbers. See Criminal

noted earlier, I have chosen to calculate rates per 100,000 APAR myself, rather than rely on the state's rates, to avoid differentials based solely on different numbers (or definition) of population. I use crime and arrest figures for two reasons. First, arrest figures can serve as a proxy for how aggressive and/or effective law enforcement is in a particular locale at the front-end (through the use of community policing, etc.). (I also examined county clearance rates to determine how effective a given county was at solving crimes.⁴¹) Second, because there are no reported drug crime statistics, drug arrests serve as a proxy for drug crimes, albeit an imperfect one, since they conflate policing resources, strategies, and priorities with the level of underlying activity.

These data are subject to a number of limitations.⁴² If multiple crimes take place, only the most serious is recorded.⁴³ Crime is generally seen to be underreported: a particular county might have actual crime rates that are a greater or lesser percentage of reported crimes. The same is true when an offender is arrested for multiple offenses.⁴⁴ The state collects information on dispositions; however, this data is marred by a very large "other" category and the state cautions that dispositions "data may or may not be representative at the county level."⁴⁵ Accordingly, I have focused only on county jail and probation figures. Within the jail data, I have ignored data on Type I facilities, which are used only for detentions of up to 96 hours, not sentencing; I have, instead, used figures for Type II, III, and IV facilities,⁴⁶ because they can be used to sentence offenders. These

Justice Statistics Center, Criminal Justice Trend Data Footnotes, available at http://stats.doj.ca.gov/cjsc_stats/prof09/footnotes.pdf.

⁴¹ The entry page for the Criminal Justice Statistics Center's county clearance data is available at [county.http://ag.ca.gov/cjsc/statisticsdatabs/ClearanceCo.php](http://ag.ca.gov/cjsc/statisticsdatabs/ClearanceCo.php). Individual county data was taken by following links to each county; I calculated clearance rates using the number of cleared cases.

⁴² See, e.g., Criminal Justice Statistics Center, "Data Characteristics and Known Limitations," available at http://stats.doj.ca.gov/cjsc_stats/prof09/limits.pdf. See also Criminal Justice Statistics Center, Criminal Justice Trend Data Footnotes, available at http://stats.doj.ca.gov/cjsc_stats/prof09/footnotes.pdf.

⁴³ *Id.* at 1.

⁴⁴ *Id.* at 2.

⁴⁵ *Id.*

⁴⁶ Cal. Code Regs. Title 15 § 1006 defines Type II, III, and IV facilities thus:

"Type II facility" means a local detention facility used for the detention of persons pending arraignment, during trial, and upon a sentence of commitment.

"Type III facility" means a local detention facility used only for the detention of convicted and sentenced persons.

figures are taken from actual population reports and are divided between sentenced and non-sentenced prisoners. Non-sentenced prisoners are those who are denied bail, unable to make bail, or on some form of temporary detention.

Cost per Prisoner. I calculated the cost per prisoner by using corrections budget figures⁴⁷ and dividing by the prison population. This is a crude approximation of the cost per prisoner, since there are certain fixed costs in the state prison system that are not fully realized on a marginal basis, and because some of the funds go to the Department of Juvenile Justice. However, this is the same method the Bureau of Justice Statistics has used in its State Prison Expenditures series.⁴⁸ Again, because the state's fiscal year goes from July to June 30, I averaged two years together in order to get approximations of calendar year figures, with the exception of 2000, for which I simply used 2000-01 figures.

"Type IV facility" means a local detention facility or portion thereof designated for the housing of inmates eligible under Penal Code Section 1208 for work/education furlough and/or other programs involving inmate access into the community.

⁴⁷ These figures come from the Final Budget Summary published by the Department of Finance for a given year. The entry page for these documents is available at <http://www.dof.ca.gov/budget/historical/>. Specifically, my budget figures for particular years came from the 2000-01 report at 48, available at <http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/2000-01budsum.pdf>; the 2001-02 report at 41, available at <http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/2001-02budsum.pdf>; the 2002-03 report at 384, available at <http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/2002-03budsum.pdf>; the 2003-04 report at 2, available at <http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/2003-04budsum.pdf>; the 2004-05 report at 6, available at http://www.documents.dgs.ca.gov/osp/GovernorsBudget04/pdf/fbudsum_04.pdf; the 2005-06 report at 11, available at http://www.documents.dgs.ca.gov/osp/GovernorsBudget05/pdf/fbudsum_05.pdf; the 2006-07 report at 400, available at http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/fbudsum_06.pdf; the 2007-08 report at 14, available at http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/fbudsum_07.pdf; the 2008-09 report at 18, available at http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/fbudsum_0809.pdf; the 2009-10 report at 7, available at http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/fbudsum_09.pdf.

⁴⁸ See, e.g., James J. Stephan, State Prison Expenditures, 2001, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf>.

My calculations are actually lower than the estimates published by the state Legislative Analysts' Office, which estimated that the cost of incarcerating each prisoner in California in 2008-09 was \$47,102.⁴⁹ My estimate for the calendar year 2008 was \$41,200.05. Because the LAO has not released estimates for all the years in my survey, however, I decided to use calculated figures. If anything, this indicates that the subsidy the state pays to counties which are heavy users of the state prison system—and the corresponding tax to those who do not use it as heavily—might be greater than the figures used in this Article.

B. Limitations of the Study

The main difficulty with this study is deciding what proxy to use for the “fair” rate of prison usage to which a county is rightfully entitled. I make no normative claim about how a county should use prison, nor have I found a statistical one.⁵⁰ There is no consensus on this in California, academia, or elsewhere. In fact, that is the point of this series of articles: that given this lack of consensus, residents of a particular county should not have to pay for the policy choices of residents of another county. High coverage rates are not necessarily bad, nor are low ones good. My point is only that if there is no consensus, high rates should not be subsidized, nor low rates penalized. In other words, while I make no claims about high usage itself, I do claim that the state’s prison resources should not be distributed on a first-come, first-served basis.

While using violent crime rates is a crude measure of the need for prison, I do not believe there is a “real offense” alternative. That is, there is no way to readily look at a given criminal case or set of criminal cases

⁴⁹ See California Legislative Analysts’ Office, California’s Annual Costs to Incarcerate an Inmate in Prison^x?catid=3. See also California State Auditor, California Department of Corrections and Rehabilitation: It Fails to Track and Use Data That Would Allow It to More Effectively Monitor and Manage Its Operations, September 2009 at 26 (estimating an annual cost per inmate in 2007-08 of \$49,300); available at <http://www.bsa.ca.gov/pdfs/reports/2009-107.1.pdf>.

⁵⁰ In fact, as I have argued elsewhere, I believe that normative questions cannot be avoided even in a heavily-quantified context. See W. David Ball, Normative Elements of Parole Risk, 22 Stan. L. & Pol'y Rev. 395, 397 (2011) (questioning whether parole release is “inherently about risk or inherently about desert, or whether it is irreducibly about both.”)

and determine which ones should result in a prison sentence and which ones shouldn't. There are a number of complicating factors. The first is plea bargaining. Charged offenses are an inaccurate measure of the real offense because a DA might overcharge for strategic reasons, in order to posture during plea or charge bargaining. Offenses might also be undercharged as the result of such bargaining. The second complicating factor is evidentiary. The strength of an individual case has as much to do with evidentiary concerns as with the heinousness of the underlying conduct. A case with bad facts might nevertheless get a lower sentence due to a lack of witnesses or a lack of high-quality witnesses (for example, witnesses who can be impeached due to prior criminal offenses). There might also be evidence excluded due to police violations of the Fourth Amendment, or confessions invalidated due to violations of the Fifth Amendment. A third issue has to do with what the defendant might be able to offer in a different case. Individuals with valuable testimony to offer can exchange that testimony for reduced sentences even if they're caught red-handed. This, again, has nothing to do with the real offense conduct at issue. Finally, isolating aggravating sentencing factors such as prior offenses, use of a particular weapon, proximity to school (in the case of drug dealing), etc., would be far too complex. I considered using "wobblers"—California crimes which can be charged as felonies or misdemeanors—but could not control for the above variables. If there were a way to determine whether an offense should have been charged as a felony or misdemeanor, one could obviously see how it was, in fact, charged and determine over- or under-use of prison accordingly. But asking how a wobbler should have been charged is, in fact, the question we can't answer. The point of this study is not to question the decisions of individual DA's, judges, or juries in individual cases, but to start to explore the systematic differences that might explain why California counties use prison at different rates.

To understand how counties use the state prison system, one could also look at county NFA by offense category (e.g., San Bernardino sent X new admissions to prison in 2006 on drug offenses).⁵¹ The state,

⁵¹ The state, does, however, publish commitment offense data for the prison population as a whole. See, e.g., CDCR Population Reports, *supra* note X, at tbl. 9 for the years 2000-2006 and tbl. 8 for the years 2007-2009. In 2009, for example, 55.5% of men in the CDCR were imprisoned for crimes against persons (including homicide, robbery, assault, kidnapping, and sex offenses including not only rape but other sex offenses), 19.5% for property offenses, 17.0% for drug offenses, and 8.1% for other crimes (including arson and escape).

unfortunately, does not make public its commitment offense data broken down by county I have chosen to approximate the effect of crime through the use of coverage rates, but a longitudinal study breaking down county sentences per offense per year would be extremely useful.⁵² One could look at the reported crimes for a given offense type and then see how many of those offenses were actually covered by NFA. This would show precisely what effects particular types of crime have on NFA. That said, because all types of crime are lower in what I call “High Use” counties, even without this data I conclude that there is no real issue about whether crime is driving incarceration. The only outstanding issues are the precise magnitude of the prison use, and the particular mechanisms by which it takes place.

I used counties as the subdivision of the state primarily because there are several county-wide elected officials instrumental in criminal justice. County citizens elect sheriffs, DA's, and judges, counties administer parole, cities within counties elect the mayors who appoint police chiefs, and juries are drawn from within counties. Perhaps a better way of putting it is that California citizens outside their own counties have no say in selecting another county's sheriffs, judges, DA's, or juries. Counties are thus responsible for the overwhelming proportion of law enforcement within their borders, the charges that are filed, the trials that take place, and the jails or probation departments to which offenders might be sent. California also publishes its crime data by county.

Nevertheless, I concede that different parts of counties can be different from one another, and might have more in common with parts of neighboring counties than they do with parts of their own counties.⁵³ Counties can be a mix of rural and urban, for example, and this might bear on the way crime manifests itself. Cities within counties also drive their own policies, primarily through municipal police departments. Some counties might have transient populations, or be victimized by criminals

⁵² I have advocated before on behalf of collecting and disseminating criminal justice data in California. See *E Pluribus Unum: Data and Operations Integration in the California Criminal Justice System*, 21 Stan. L. & Pol'y Rev. 277, 309 (2010) (“Ultimately, giving citizens comprehensive, detailed information about the policies and practices of criminal justice agencies can promote more well-informed decisions, transparency about existing practices, and better civic discussions about the purpose of criminal law.”).

⁵³ For a fuller discussion, *see id.* at 294 (discussing shortcomings with the county as the base unit for criminal justice).

who reside in neighboring counties. Even within a given county agency, different parts of the county might have different approaches. Different offices of a county DA might have different “going rates” for a given crime, for example, particularly in a county as large as Los Angeles.

I look at rates, not numbers, for a variety of reasons. The primary reason is the high degree of collinearity between population size and gross amounts of violent crime and new felon admissions.⁵⁴ That is, bigger counties have more crime and more NFAs as a result of having more people. Population size has nothing to do with NFA rate, however: county population is not a reliable predictor of NFA rates normalized to 100,000 residents.

Comparing rates within a given year has the additional advantage of isolating for year-to-year statutory and regulatory changes. Statutes—albeit not their execution—are uniform across the state for every given year, but they change from year to year. This study looks laterally from county to county in a given year, not within a county across time. Year-to-year NFA rates, for example, would have to account for changes in the penal code during the period studied. Proposition 36, for example, was passed in 2000 and went into effect in 2001, and allowed for first- and second-time nonviolent drug offenders to be diverted into treatment in lieu of incarceration.⁵⁵ This likely had some year-to-year effect on drug NFA.

I note that my conclusions are only as good as the reported data. I take no position on how accurate the data is, and I note that the state has expressed skepticism about particular counties’ data in particular years.⁵⁶ I am unaware, however, of any systematic bias in the data. I note further that the bias would have to operate for a particular county in a particular direction on a multi-year basis in order to skew the results. That is,

⁵⁴ Running a linear regression with gross (non-normalized) amounts of NFA as the dependent variable and gross (non-normalized) amounts of county population, violent crime, and property crime as the independent variables, the tolerance levels are between .035 and .105, meaning that 89.5 percent or more of the variance of each predictor can be explained by the other predictors. The variance inflation factors (VIFs) for each are also high, ranging from 9.521 to 28.338. VIFs above 2 are considered problematic.

⁵⁵ See California Proposition 36, <http://www.prop36.org/>.

⁵⁶ See, e.g., Criminal Justice Statistics Center, “Data Characteristics and Known Limitations,” available at http://stats.doj.ca.gov/cjsc_stats/prof09/limits.pdf. See also Criminal Justice Statistics Center, Criminal Justice Trend Data Footnotes, available at http://stats.doj.ca.gov/cjsc_stats/prof09/footnotes.pdf.

Alameda would have to over report crime for ten years and/or San Bernardino underreport it for the same duration, for example, in order to skew my results.

Finally, there are the obvious limitations of statistical analysis itself (and of my abilities). There is more than one way to analyze data, and several tools to do so. My goal in this Article is to dispel the idea that NFA are the necessary result of crime rates. While I believe that the data provide potential insights, lack of a statistically significant correlation does not mean that there is in fact no correlation given chance variability. The analysis may also be altered by omitted variables.

C. Methods

This part explains the methods I used to subdivide California into four groups on the basis of violent crime coverage and the calculated prison subsidy: High Use counties, Low Use counties, Los Angeles County, and Middle Use counties. The terms “high use,” “low use,” and “middle use” are, of course, relative, given that there is no consensus on the “fair” level of incarceration, and thus these counties might have more accurately been described as “Higher Use” counties. For my purposes, “High Use” meant a county that appeared in the top quartile more than 7 times in 10 years in either coverage rate or subsidy; “Low Use” meant a county that appeared the same number of times in the bottom quartile of these measurements.

Coverage, again, is the ratio of new felon admissions (NFA) to reported violent crime, expressed as a percentage. I calculated the yearly state average coverage rate for each of the ten years of the study (2000-09). I then calculated yearly coverage rates for each of California’s 58 counties. I expressed the county coverage rate as a percentage of the state coverage rate, which gave me a relative measure of how much a given county’s coverage exceeded or undercut the state rate for that given year. Mathematically, the formula was

$$\text{Relative Coverage}_{\text{year}} = \text{County Coverage}_{\text{year}} / (\text{State Coverage}_{\text{year}}).$$

This had the benefit of controlling for year-to-year statewide differences in crime rate, pinpointing which *counties* were relatively more carceral, not which *years* were. I divided the results into quartiles. The top quartile

contained county coverage rates that were almost twice as large as that of the state coverage rate for that year (199.75%); that is, in those years, these counties sent almost twice as many people to prison per reported violent crime as the state as a whole. Two counties appeared in the top quartile all ten years: Kings and Sutter. Eight more appeared at least seven times: Glenn and Trinity (eight years) and Butte, Colusa, Inyo, Lake, Lassen, and Shasta Counties (seven). In the bottom quartile, six counties had coverage rates less than or equal to 88.29% of the state coverage rate in all ten years: Alameda, Contra Costa, San Francisco, San Joaquin, and Santa Cruz. Eight more were in the bottom quartile at least seven times: Marin (nine), Imperial (eight), and Alpine, Nevada, Sacramento, San Benito, Sonoma, and Stanislaus (seven). I used all ten years of data for any county listed above, even those with some yearly data not in the top quartile. I did so because the purpose of this study is to discover whether there is something inherent in these particular counties, not to explore what might have happened in anomalous years.⁵⁷

I then divided the state based on a calculated prison subsidy. The ultimate focus of this Article is on the use of state prison resources. Because small counties with high coverage rates nevertheless consume very little of the state's ten billion dollar prison budget, this measure accounted for gross numbers of each county's reported violent crime.

As with coverage, I looked at counties who appeared in the top or bottom quartile more than seven times. Counties appearing in the top subsidy quartile all ten years were Butte, Kern, Kings, Orange, Riverside, San Bernardino, and Santa Clara; Fresno and Shasta were in the top quartile nine times; Placer and Santa Barbara eight; Sutter seven. Counties in the bottom quartile all ten years were Alameda, Contra Costa, Sacramento, San Francisco, San Joaquin, and Santa Cruz; Imperial, Los Angeles, and Marin were in it nine years; and Nevada, San Diego, Sonoma, and Stanislaus were in it seven years. I included data from all ten years for each county in the top and bottom group; San Diego actually appeared twice in the top quartile for subsidies, which shows how these figures are sensitive to small changes in coverage for counties with large populations.⁵⁸

⁵⁷ A complete list of all counties is in Appendix A. I have mapped these counties in Appendix B.

⁵⁸ My estimates are below that of the LAO's, so I may have understated the costs.

Initial analysis revealed that both coverage and subsidy top and bottom quartiles exhibited similar responsiveness to the key variables I will analyze. I grouped them together in what I call the Low Use and High Use groups respectively. High use counties, in other words, contain counties with high coverage, high subsidies, or both. Low use counties contain counties with low coverage, low (negative) subsidies (taxes), or both. I will discuss general observations about these groups in the following Section.

Because Los Angeles is such a large county, I decided to calculate results for the Low Use group without it, even though Los Angeles had a negative subsidy in nine of the ten years of the study. This also means that the populations of the High and Low Use groups are relatively similar—and relatively similar to that of Los Angeles—and thus that contrasts between them can be more readily observed.⁵⁹

This leaves twenty five other counties, with a combined average population of 4.5 million, who did not appear more than seven times in either the top or bottom quartile. While the bulk of my analysis will focus on the other three segments of California, I note that this group is more heterogeneous than would indicate. For example, Merced and Yolo are both members of this group, have almost identical NFA numbers, yet Yolo has much less violent crime (and property and Part I crime) than Merced, giving it a much higher coverage rate. Several counties appeared in the top quartile more than four times: Modoc and Yuba (six); Plumas, Sierra, and Siskiyou (5); and Amador, Calaveras, and Tuolumne (4). Only one county appeared more than four times in the bottom quartile: Monterey (5).

Table 2: Demographics of the Four State Segments, Average Yearly Values 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
Population (millions)	11.74	10.17	10.07	4.53	36.51
APAR	7.62	6.81	6.55	3.00	23.98

⁵⁹ Average total population from 2000-09 (adult population at risk in parentheses) for Los Angeles was 10.1 million (6.6 million), Low Use was 10.2 million (6.8 million), and High Use was 11.7 million (7.6 million).

Population (millions)					
Prison Population	55,079	37,023	54,187	17,612	164,000
Number of Counties	18	14	1	25	58

Bold: highest value; *Italics:* lowest value. All figures based on ten year averages.

All data was prepared in Excel. I then used SPSS to draw histograms and scatterplots, using linear regression models and linear fit lines.

Syntax for my SPSS work has been posted to the folder with the rest of my data.

II. VIOLENT CRIME RATES AND NEW FELON ADMISSION RATES

On a statewide level, although violent crime rates and NFA rates are correlated, violent crime does not sufficiently explain why counties have such disparate NFA rates. Why do counties respond to violent crime so differently? Throughout this section, I will use the coverage variable as my proxy variable for a county's carceral response to violent crime.

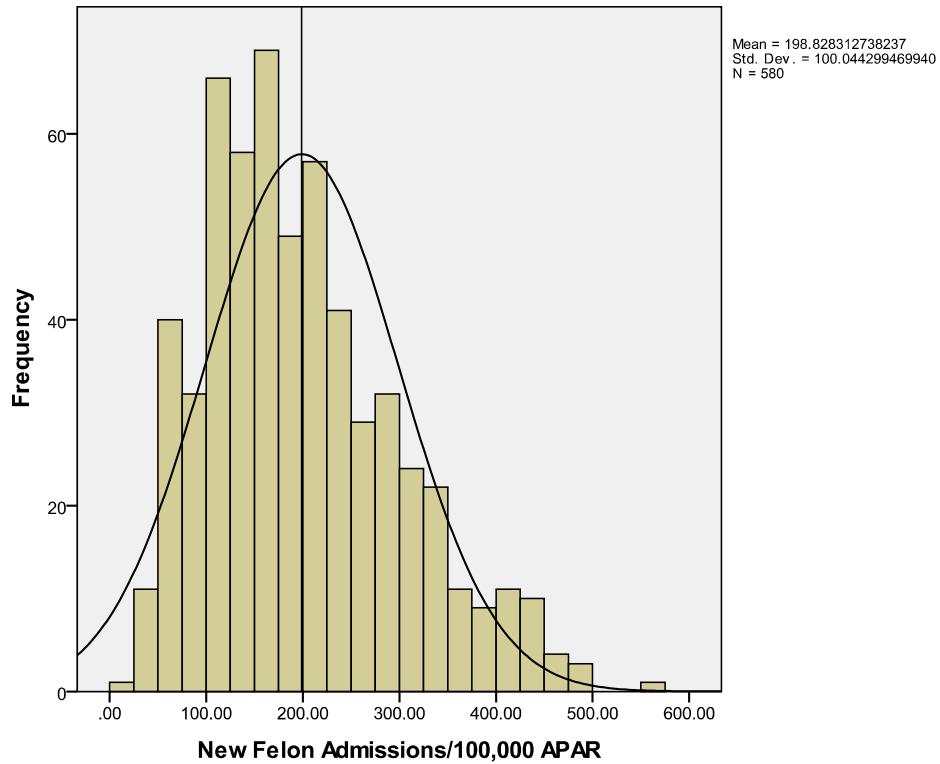
I begin with a discussion of the statewide numbers, then examine High Use counties, Low Use counties, Los Angeles County, and the rest of the state.

A. *The State*

In this section, I will first demonstrate that some counties systematically use prison at different rates. I will then look at whether violent crime explains this differential usage at the statewide level.

First, counties send people to prison at different rates, even without correcting for crime. Figure 2 plots NFA rates, normalized to 100,000 APAR. The chart looks at all 58 counties for all ten years of data, and counts the number of instances counties reported a particular NFA rate.

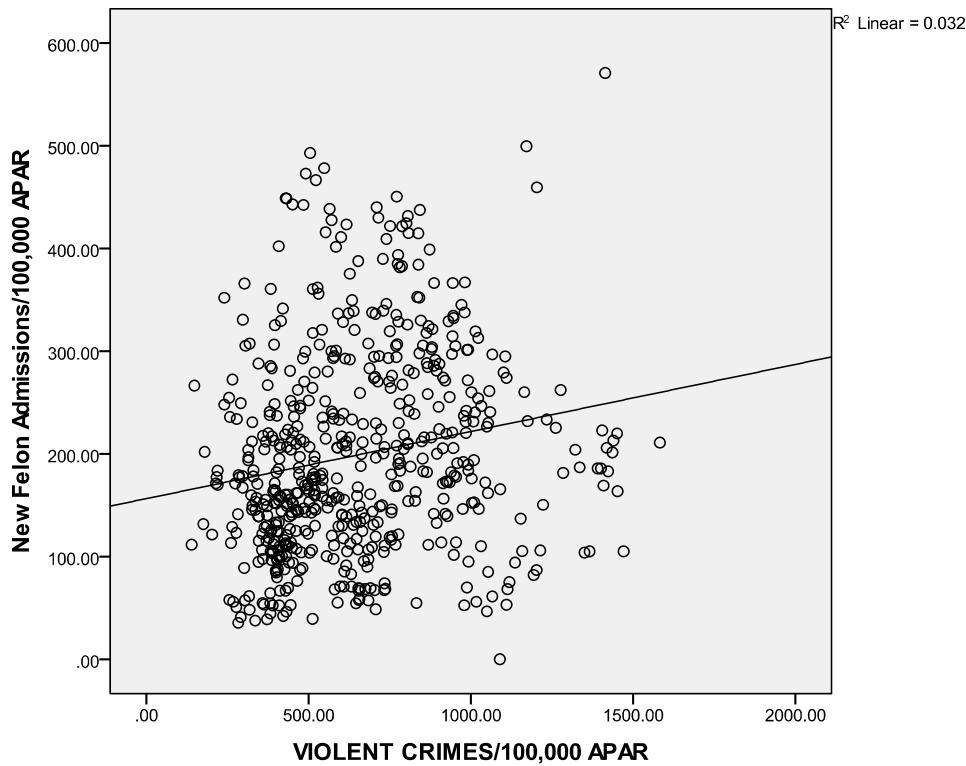
Figure 2: Frequency of NFA Rates/100K APAR, 2000-2009



The shape of the histogram is relatively normal, although high NFA counties skew the distribution right. If counties were in these ranges an equal amount of time, the distribution would be normal as well. But, as noted *supra*, certain counties appear consistently in the top and bottom quartiles. Some counties consistently send people to prison at greater rates than others.

But NFA only tells part of the story. NFA looks normal when compared to population. NFA as a function of violent crime presents a more chaotic picture. Figure 3 plots NFA rates and rates of reported violent crime for all 58 counties and all 10 years.

Figure 3: Violent Crime to NFA (Rates, 100,000 APAR), 2000-2009



Although the relationship of the Violent Crime Rate per 100,000 APAR is statistically significant at the 1 percent level, it is not a significant statistic. The amount of variance it explains is minute ($r^2 = .032$, which means changes in Violent Crime rates explain 3.2 percent of the variance in NFA rates), and the standard error is relatively large (root mean squared error (RMSE) = 98.50139). What does this mean? The scatterplot data shows that, although a linear fit line can be drawn, the data do not cluster around it and the relationship is barely above zero. In other words, if we were to use violent crime rates to predict NFA rates at the statewide level, the amount it would predict would be very small, and there is a chance that it would not be able to predict even that small relationship with accuracy.

Just looking at NFA rates, the data are normal. Looking at NFA and violent crime, it looks more chaotic. Segmenting the state will help clarify whether there are patterns in the data, to see whether violent crime might affect NFA in different segments of the state.

B. Violent Crime and NFA in the Four State Segments

Crime rates do not, themselves, explain why some segments have higher NFA and higher total prison populations than others. High Use counties have below-average crime, and Low Use counties have above-average crime.

I will look at criminal justice statistics for each of the four segments (High Use, Low Use, Los Angeles, and Middle Use) to see what, besides levels of state prison usage, distinguishes them, in hopes of shedding light on why each segment uses state prison resources at such different rates. The analysis here will largely be descriptive, not predictive.

Table 3: Crime Rates and Prison Usage, Average Yearly Values, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Average
Violent Crime	622.67	835.94	1,128.27	609.13	819.70
Property Crime	2,618.73	3,134.31	2,780.05	2,296.28	2,768.84
Part I Crime	5243.54	6404.46	5494.90	4881.71	5,596.56
NFA	223.57	<i>122.04</i>	211.87	167.99	184.58
VC Coverage Rate	35.90%	<i>14.60%</i>	18.78%	27.58%	22.52%
Total Prison Population	723.13	543.63	826.68	586.48	683.36

Bold: highest value; *Italics:* lowest value. All figures except VC Coverage Rate are calculated per 100,000 APAR. State averages include Los Angeles County.

High Use counties are not the group with the highest violent crime, property crime, or total Part I crime rates. All three rates, in fact, are below the state average. What's more, both the Low Use counties and Los Angeles have higher Violent, Property, and Part I crime rates while maintaining lower NFA rates. Low Use NFA rates are nearly half those

of High Use counties, even though each measure of crime is more than twenty percent higher. The Middle Use counties have the lowest crime rates in all three categories, but still use prison at substantially higher rates than the Low Use counties.

The chart also demonstrates the importance of choosing what to measure. Los Angeles has a significant violent crime problem, but property and Part I crime rates are at the state average. Los Angeles incarcerates at an NFA rate lower than that of the High Use counties, but its total prison population rate is the highest of the four segments. For my purposes, because Los Angeles has a significant violent crime problem, its coverage rate is half of High Use counties. But on alternative measures of crime, such as property and Part I, Los Angeles is at the state average, so its above-average NFA rate expressed in terms of Property Crime Coverage or Part I Coverage would be unjustified.

It is also not the case that NFA differences are explained by the type of violent crime a county experiences. As seen in Table 4, rates of all four categories of violent crime are below the state average in High Use counties. More importantly, the numbers of more serious crimes are not large enough to drive differences in NFA. There simply just aren't that many rapes and homicides to account for the difference, even if High Use counties had a 100 percent clearance rate on those crimes.

Table 4: Average Yearly NFA and Violent Crime Rates, by Offense, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Average
NFA	223.57	122.04	211.87	167.99	184.58
Homicide	6.81	8.66	14.91	6.54	9.51
Forcible Rape	37.41	42.36	37.85	41.34	39.43
Robbery	173.83	293.87	423.43	139.60	271.84
Aggravated Assault	404.62	491.05	652.07	421.65	498.92

Bold: highest value; *Italics:* lowest value. All figures except VC Coverage Rate are calculated per 100,000 APAR. State averages include Los Angeles County.

I will now discuss each of the segments of the state in greater detail, describing how they are different and what impact each has on the overall state prison population.

1. High Use Counties: Dominated by the Subsidized

The High Use counties are made up of three more or less equal numbers of counties: those in the top quartile of coverage, those in the top quartile of subsidy, and those who were in both. However, though the numbers of counties are similar, their populations are not. The large counties in the subsidy group are the overwhelming source of this segment's population, and will get the majority of the analysis.

Table 5: High Use Counties, Average Yearly Values, 2000-2009

	High Coverage	High Subsidy	Both	High Use Total	High Use as % of State Total
Population (millions)	.18	10.94	.62	11.74	32.16%
Number of Counties	6	8	4	18	31.03%
Prison Population	1,085	49,391	4,603	55,079	33.60%
NFA	271.68	215.75	344.10	223.57	38.46%
Violent Crime	497.50	626.19	598.84	622.67	24.12%
Coverage Rate	54.61%	34.45%	57.46%	35.90%	N/A
Part I Crime Rate	3,882.92	5,274.60	5,109.53	5,243.54	29.75%

Bold: highest value; *Italics:* lowest value. NFA, Violent Crime, and Part I Crime Rate are calculated per 100,000 APAR off 10 year averages. State averages include Los Angeles County.

Counties in the “high coverage” and “both” groups are generally too small to make much of a difference statewide. High coverage counties in particular are not populated enough to make much of an impact on the

state's prison population or on its bottom line. The counties with both high coverage and high subsidies are also small, but they incarcerate at such high coverage rates that they nevertheless manage to make it into the top quartile of subsidy. NFA rates for the "both" group are nearly twice that of the state average (344.1 versus 184.58), even though violent crime rates are just three-quarters of the state rate (598.84 versus 819.70). This yields a coverage rate more than twice that of the state average (57.46% versus 22.52%). These counties are so far out of step with the rest of the state that despite having just over 620,000 people, their average group subsidy is almost thirty million dollars.⁶⁰

The "subsidy" group is relatively tame by comparison, incarcerating at a coverage rate only fifty percent more than the state average. In fact, looking at NFA rates alone (184.58 for the state, 215.75 for the subsidy group), the subsidy group doesn't appear to be so unusual. But these NFA figures are higher despite the fact that the justifications for prison—crime rates—are below the state average in all three major categories: violent crime, property crime (not pictured), and Part I crime. Again, this underscores the fundamental difference between looking at prison usage alone—i.e., NFA rates—and tying that usage to its justification. Looking at rates based on population alone can, in some cases, obscure the fact that a county lacks a crime-based justification for the level of incarceration it uses.

2. High Subsidy Revisited: The Rich Four and the Poor Four

The high subsidy counties can be further divided on the basis of income. They divide neatly into two groups of four counties, both with roughly the same population. The "Rich Four" counties are Orange, Placer, Santa Barbara, and Santa Clara. Three of these counties reported incomes above the state per capita average each of the ten years in the study, and one of them (Santa Barbara) was above the state average seven times (missing by less than \$617 the other three times). The "Poor Four" counties are Fresno, Kern, Riverside, and San Bernardino. Each of these counties reported incomes below the state per capita average for all ten years, and none got any closer than \$8,000 below the state average in any of those years.

Table 6: The Rich Four and the Poor Four, Average Yearly

⁶⁰ See Table 17 and accompanying text, *infra*.

Values, 2000-2009

	Rich Four	Poor Four	State Total
Population (millions)	5.52	5.42	36.51
APAR Population (millions)	3.68	3.40	23.98
Prison Population	17,280	32,111	164,000
NFA	149.31	287.46	184.58
Violent Crime Rate	442.79	824.17	819.70
Property Crime Rate	1,887.55	3,447.97	2,768.84
Part I Crime Rate	3,967.13	6,686.01	5,596.56
Coverage	33.72%	34.88%	22.52%

Bold: highest value; *Italics:* lowest value. All figures based on ten year averages.

This chart again reveals how coverage changes the analysis. The rich and Poor Four have dramatically different NFA rates, but because they also dramatically different violent crime rates, their coverage rates are very similar. If one looked only at NFA rates per 100,000 APAR, the Rich Four appear to use very little prison, with an NFA around nineteen percent below the state average. The problem is that the Rich Four's violent crime rate is approximately 46% below the state average. The Rich Four incarcerate less than the state, but not as much as their crime rate indicates. Over-use is relative, and using less can be using more if your crime rate is low.

The Poor Four, on the other hand, have violent crime rates slightly above the state average, but their NFA rate is more than 50% greater than the state's NFA. They are justified in incarcerating at a higher rate, but not to the extent that they are. Again, looking at NFA rates themselves obscures the fact that violent crime is not driving these rates.

The Rich Four and the Poor Four are a drain on the rest of the state. To the extent that these counties are being subsidized for prison usage that cannot be explained by violent crime, the Rich Four cannot justify their subsidy on the basis of need. It would be difficult for them to argue that they are due a larger share of the state prison budget either because they cannot afford it (they can) or because crime demands that they do so (they are relatively safe). The Poor Four do not have the same resources as the Rich Four, but they consume many more prison resources than the Rich Four, and more than the state coverage rate would indicate. To the extent the state needs to focus on overcrowding, however, these are the counties that incarcerate at a high rate and in large numbers.

3. Low Use Counties: The Convergence of Low Coverage and Low Subsidy

Low Use counties are clustered in the “both” category of both low coverage and low subsidy. The eleven counties with most of the population also have the lowest coverage rates, which means they have the lowest subsidy. I use the word subsidy only for consistency—based on violent crime rates, all members of the Low Use group are negatively subsidized. That is, they pay a very substantial prison tax.

Table 7: Low Use Counties, Average Yearly Values, 2000-2009

	Low Coverage	Low Subsidy (minus LA)	Both	Low Use Total	Low Use as % of State Total
Population (millions)	.06	3.03	7.08	10.17	27.85%
Number of Counties	2	1	11	14	24.14%
Prison Population	1,262	12,713	24,183	37,023	22.59%
NFA Rate	124.53	140.93	113.89	122.04	18.77%
Violent Crime Rate	648.35	671.93	908.08	835.94	28.96%
Coverage Rate	19.21%	20.97%	12.54%	14.60%	N/A
Part I	4,340.26	5,051.86	7,003.53	6404.46	32.49%

Crime Rate					
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Bold: highest value; *Italics:* lowest value. NFA, Violent Crime, and Part I Crime Rate are calculated per 100,000 APAR off 10 year averages. State averages include Los Angeles County.

As stated earlier, Los Angeles was in the subsidy bottom quartile but is being excluded for other reasons, leaving this group with only San Diego in the subsidy category. San Diego has violent and Part I crime rates well below the state average, and a coverage rate around 1.5% below the state average. Because it is a large county, however, small changes in coverage result in large changes to the calculated subsidy. In fact, San Diego appeared in the top quartile for subsidy twice, but because it was in the top quartile seven years, I included it in the Low Use list. The low coverage counties, Alpine and San Benito, are too small to deserve much comment.

The rest of the counties in the group are relatively large. The “both” counties have a coverage rate a third that of the High Use counties. These counties have violent crime and Part I crime rates well above the state average, with an NFA just two-thirds of the state average. In these counties, then, consisting of twenty percent of the state’s population, higher crime rates are associated with lower prison use.

4. Low Coverage and Subsidy Divided by Income: The High Five and the Low Six

These counties can also be divided into relatively equal populations on the basis of income, but they do not divide as neatly. Including only the counties below the state per capita income level in all ten years (Imperial, Sacramento, San Joaquin, Stanislaus) would have resulted in too unequal a division of population, so I added two counties with the next lowest incomes (Nevada and Sonoma). The richer 5 counties are Alameda, Contra Costa, Marin, San Francisco, and Santa Cruz.

Table 8: Dividing Low Coverage, Low Subsidy Counties, Average Yearly Values, 2000-2009

	Low Six	High Five	State Total
Population (millions)	3.23	3.85	36.51

APAR Population (millions)	2.09	2.64	23.98
Prison Population	14,797	9,386	164,000
NFA	158.09	78.96	184.58
Violent Crime Rate	961.07	866.2	819.70
Property Crime Rate	3744.92	2952.36	2,768.84
Part I Crime Rate	7,521.39	6,594.29	5,596.56
Coverage	16.45%	9.12%	22.52%

Bold: highest value; *Italics:* lowest value. All figures based on ten year averages.

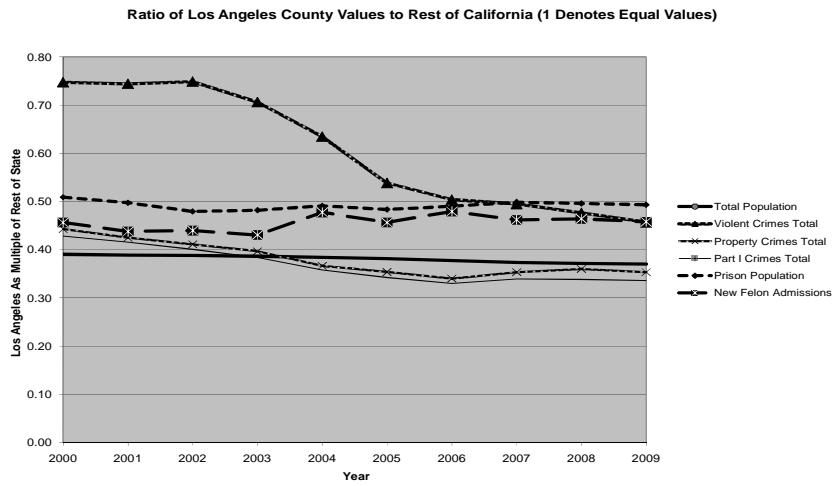
Table 8 summarizes the differences between the two groups. I note, however, that the distribution of crime among these counties does not track income group. Both sets of crime rates are above the state average, and they are more or less equally distributed on either side: Marin (rich) and Nevada (poor) have violent crime rates in the 300's, Alameda, San Francisco (rich), Sacramento, San Joaquin, and Stanislaus (poor) have violent crime rates above 1000, and Contra Costa, Santa Cruz (rich), Imperial, and Sonoma (poor) are in the 500 and 600's. Coverage rates are generally lower in the high income areas, however, as are NFA.

5. Los Angeles

Los Angeles County is atypically large, accounting for slightly less than a third of the state's population and about a third of its prison population, but its prison usage is not atypically high when its high violent crime rate is factored into account. On a per capita basis, LA's NFA rate is higher than the state average. However, its violent crime rate is almost fifty percent greater than the state average. The coverage variable expresses this relationship more simply: LA's coverage rate is less than the state average, and about half that of the High Use counties. LA does have below average property and Part I crime rates, however; an analysis

that did not center on violent crime might conclude that LA's prison usage is not negatively subsidized.

Figure 4: Los Angeles County and the Rest of the State, 2000-2009



The above chart summarizes LA's relationship to the rest of the state graphically; LA comes in generally at about 40-50% of the rest of the state numbers, except for violent crime in the early part of the past decade.

6. Middle Use Counties

The population of these counties is small to medium range, ranging from tiny Sierra County to relatively populous San Mateo and Ventura counties. Yearly coverage rates bounce around, reaching lows of about 1/3 the state coverage rate and highs several times the state rate. Annual NFA rates range from less than 100 to more than 400 in particular years. These counties, though, were ones that might have particular years—or even several years—of High or Low Use that nevertheless did not exhibit the kind of consistency (seven of ten years) required for inclusion into either group.

III. ALTERNATIVE EXPLANATIONS

In this section, I discuss what else besides violent crime could be causing these disparities. Because I have already looked at property crime and Part I crime (the general crime rate), and because other types of crime (notably sex offenses) are so rare that they could not account for the disparity, I will briefly examine drug offenses. I then look at law enforcement, using general arrest data as a crude proxy for how active a force is, to try to explore whether high coverage is simply a matter of more effective law enforcement. I next look to in-county dispositions—jail and probation—to see if differential usage of these resources explains differences in prison usage. I next look at local resources—using per capita income as a proxy—as a means of exploring whether counties rely on prison because they do not have the money to do anything else. I examine the role of politics by analyzing voter registration numbers, to see if party politics or levels of participation might explain what's different about different segments of the state.

From time to time, I will discuss state segments as they bear on the variables in question. These factors will not operate similarly across counties—California is a huge, diverse place. The principal statistical inquiry was, of course, whether violent crimes explain differences in prison usage. This part simply tries to shed some light on what might explain differences in usage, although it should be seen only as a very preliminary investigation.

A. Arrest Data

As we have seen, differences in property crime and Part I crime rates inadequately explain differences in NFA rates. In this section, I look at other types of crimes—notably drug crimes—for a possible explanation. As stated earlier, drug crimes themselves are not reported. Therefore I will use drug arrests as a very crude measurement of actual drug crimes. There are obvious problems with this method, because arrests are never a complete—or accurate—measure of any criminal activity, but drugs are such a big part of the prison system, I believe it's better to attempt an explanation than to leave it undiscussed. This analysis, however, should be taken even more provisionally than the rest of the Article.

Arrest data might also be used as a proxy for law enforcement activity and effectiveness, or for differences in policing strategies. One might associate higher arrest rates with broken windows style policing, or

perhaps lower rates with a less active (or more cautious?) force. Without getting into the merits of different policing strategies, this section analyzes whether policing inputs could explain differences in NFA.

Table 9: Arrest Data, Average Yearly Values, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Average
NFA	223.57	122.04	211.87	167.99	184.58
Total Offense Arrests	1,802.26	1,864.45	1,858.76	1,730.58	1,826.38
Violent Offense Arrests	458.77	452.07	502.76	461.47	469.22
Coverage of Reported Violent Crimes	73.68%	54.08%	44.56%	75.76%	57.24%
Violent Crime Clearance Rate	47.36%	41.69%	44.81%	50.46%	45.05%
Property Offense Arrests	472.42	481.17	473.75	418.01	468.46
Property Coverage	18.04%	<i>15.35%</i>	17.04%	18.20%	16.92%
Sex Offense Arrests	36.06	28.27	26.93	37.00	31.47
Drug Arrests	532.34	565.52	592.97	473.87	551.01
Dangerous Drugs Arrests	354.15	260.34	220.65	301.69	284.46
Weapons Arrests	69.33	63.19	80.52	69.94	70.72

Bold: highest value; *Italics:* lowest value. All figures except percentages are calculated per 100,000 APAR. State averages include Los Angeles County.

Arrest data reveal almost no significant differences across the four segments for total arrests, property arrests, sex offenses, drug arrests, and weapons arrests. In addition, sex offenses are too small to make much of a difference in NFA rates. However, two areas which might merit closer study are dangerous drug arrests per 100,000 APAR and the ratio of violent arrests to violent crimes (the violent arrest coverage rate). Both are much higher in High Use counties than in Los Angeles County or the Low Use counties. Higher Dangerous Drug arrests might suggest that the severity, if not the number, of drug crimes might be worse in High Use areas. The high ratio of violent crime arrests to violent crime might suggest that violent crimes are policed more aggressively in High Use counties, leading to more prosecutions and more prison time. High Use clearance rates are, in fact, higher than in Los Angeles or the Low Use counties, but the difference between High and Low clearance rates is not nearly as large as the difference between High and Low Arrest Coverage.

Even taking this as true, however, and assuming that High Use counties devote more energy and resources towards fighting crime—and do so more effectively—it is still the case that responding to violent crime aggressively is a policy response to violent crime, not a function of it. Accordingly, this policy, as with all other good policies, is subject to the key question: why should the state pay for it? If it is good policy,⁶¹ after all, the county should happily make the investment itself. It is the one who made the choice to deal with crime in this fashion. The issue is not whether the policies in question are good or bad. The issue is why the state should pay for something it has no control over, a policy that benefits a readily identifiable subset of the population who, in fact, drew up and implemented the policy. Even if we were to think the state should be subsidizing these kinds of choices, there remains another question: why subsidize these counties and not others, and these policies and not others? Or is the state willing and able to subsidize all counties who wish to make this choice?

B. Local Dispositions

Do offenders go elsewhere in the system if they do not go to prison? Or does a Low Use county just use fewer carceral resources across the board—both state and local? One might expect that, on a zero sum view

⁶¹ If it is, in fact, a policy and not either random or inadvertent.

of offender management, lower use of prison would result in higher use of jail and probation. That is not the case, however. High use counties use jails at higher rates than Low Use counties, suggesting that High Use counties are simply more punitive, using incarceration at a higher rate irrespective of whether the county or state pays for it. As for probation, there is almost no difference between Low Use and High Use counties along any of the dimensions examined, a surprising result which might be the result of how the probation data are reported.

1. Jail

The issue of local jails and their ability to absorb offenders from state prisons was given an excellent, comprehensive analysis by Mike Males in his recent paper, Can California County Jails Absorb Low-Level State Prisoners?⁶² Males looked at county jail capacities and county offender mixes to estimate whether county jails could absorb the numbers of low-level offenders most likely to be returned to them under the pending realignment plan, concluding that county jails “can provide beds for only around 38% of the 15,400 low-level, non-strike property and drug convicts now held in state prisons.”⁶³

Males’s study, unfortunately, only has data from one year (2009), so I was unable to incorporate his findings fully. I use, instead, figures about jail numbers and jail budgets. I also look at percentages of jail residents who are sentenced and not sentenced. Non-sentenced residents can be those too dangerous to be released before trial, those unable to post bail, or those awaiting processing. Because Department of Justice expenditure data⁶⁴ is based on a fiscal year that goes from July 1 to June 30,⁶⁵ I averaged adjacent years to calculate an estimated yearly total. That is, figures for 2000 are the average of 1999-2000 and 2000-2001. There are no police expenditures for Alpine County; the sheriff provides the county

⁶² (March 2011,) available at
http://www.cjcj.org/files/Can_California_County_Jails_Absorb_Low-Level_State_Prisoners.pdf.

⁶³ *Id.* at 4.

⁶⁴ The entry page for the Criminal Justice Statistics Center’s county crimes data is available at <http://ag.ca.gov/cjsc/statisticsdatatabs/ExpenCo.php>. Individual county data was taken by following links to each county.

⁶⁵ See, e.g., Criminal Justice Statistics Center, Criminal Justice Trend Data Footnotes at 4, available at http://stats.doj.ca.gov/cjsc_stats/prof09/footnotes.pdf.

with all of its law enforcement.⁶⁶ These figures extend only to 2007.

Table 10: Jail Statistics, Average Yearly Values, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
Jail Population	363.96	323.30	282.49	353.17	328.80
Sentenced	121.14	115.31	92.54	137.33	113.70
Non Sentenced	242.83	207.99	189.95	215.87	215.11
% Sentenced	33.28%	35.67%	32.76%	38.89%	34.58%
% County CJ Budget Spent on Jail	14.99%	16.44%	10.54%	17.64%	14.18%

Bold: highest value; *Italics:* lowest value. All figures except Budget are calculated per 100,000 APAR; Budget figures through 2007 only. County criminal justice budget is the sum of probation, jail, and law enforcement budgets.

The jail numbers do not support the theory that Low Use counties are sentencing their offenders to jail rather than prison. Jail use is higher in both High and Middle Use counties than in Los Angeles and the Low Use counties. This tends to support the theory that High Use counties use more of all forms of incarceration, not just those subsidized by the state. These differences, however, are not nearly as stark as those involving NFA. What these population figures do not account for, however, is how crowded jails are, and whether these populations are near the jail's capacity. Males did not adopt my violent crime coverage methodology, nor did he group counties by prison use. However, looking at his list of counties with insufficient space to absorb low-level state prisoners, we see that all of the Rich Four and 3 of the four Poor Four (Kern, Riverside, and San Bernardino) are rated as having insufficient unused jail capacity to absorb returning prisoners.⁶⁷ On the Low Use side, focusing only on the combined low coverage/low subsidy group, only those counties with incomes below the average state per capita income in all four years of the

⁶⁶ Email on file with author.

⁶⁷ *Id.* at 3.

study (Imperial, Sacramento, San Joaquin, and Stanislaus) have insufficient jail space. The other seven counties have sufficient jail space.

Finally, I note that almost 2/3 of jail populations are non-sentenced, which is in line with the national average.⁶⁸ U.S. Attorney General Eric Holder recently remarked that "Almost all of these individuals could be released and supervised in their communities—and allowed to pursue or maintain employment, and participate in educational opportunities and their normal family lives—without risk of endangering their fellow citizens or fleeing from justice."⁶⁹ The problem is that many non-sentenced offenders cannot make bail; Holder suggested, instead, that they be released on their own recognizance. The numbers suggest that at least a preliminary exploration of this alternative is warranted.

2. Probation

Counties use probation in dramatically different ways, and an entire Article could be devoted to the ways in which statewide statistics obscure real local trends. Statewide figures on total probation caseloads indicate that use statewide has not changed—but several counties within the period of study have moved dramatically in non-random ways, expanding in some counties and contracting in others.⁷⁰ Moreover, some counties dramatically changed the way they use probation. To cite just a few examples, in Riverside County, total caseload almost doubled from 2000 to 2009, and new admissions more than doubled. In Santa Clara, new admissions (both total and felony only) almost doubled, but total caseload decreased around forty percent. In Orange, total caseload was also almost cut in half, but new admissions for felons stayed roughly the same. Probation might be one area in which county policies show real year-to-year variations, and it is certainly deserving of a much closer analysis than I give it here.

Table 11: Probation Use by Segment, Average Yearly Values, 2000-2009

	High Use	Low Use	Los	Middle	State Total
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⁶⁸ Eric Tucker, Holder: Petty Offenders Should Await Trial at Home, San Jose Mercury News, June 1, 2011, available at http://www.mercurynews.com/natbreakingnews/ci_18184095?nclick_check=1.

⁶⁹ *Id.*

⁷⁰ Note that some probation data is missing. See *supra* at note 14.

			Angeles	Use	
Probation Caseload	1,461.59	1,444.00	937.23	2,245.17	1,411.40
Probation Budget	\$6,933	\$7,074	\$7,137	\$7,355	\$7,082
% Felony	76.51%	79.31%	86.68%	58.90%	75.66%
Probation New Admissions	904.66	809.95	363.77	1,070.32	750.69
% Felony	73.99%	78.40%	88.93%	60.09%	74.84%
% County CJ Budget Spent on Probation	12.34%	12.10%	9.38%	13.46%	11.40%

Bold: highest value; *Italics:* lowest value. All figures except percentage figures are calculated per 100,000 APAR. All calculations made on ten-year averages except budget figures, which are through 2007 only. County criminal justice budget is the sum of probation, jail, and law enforcement budgets.

These numbers are, frankly, surprising. Some of the data is not complete, and probation data are limited to “original grants of probation and do not include subsequent grants of probation to those already under supervised probation in the same county.”⁷¹ It is unclear, though, how the results obtained could be fully explained by this. I am reluctant to draw any conclusions of my own from Table 11, but will instead point out areas that require explanation. Probation budgets are almost identical, Low Use and High Use counties have similar caseloads and felony populations. Los Angeles has fewer total probation cases and dramatically lower new admissions, suggesting perhaps that probation in Los Angeles County is longer-term than in High and Low Use counties. I am unsure whether there is a quality versus quantity story to be told here, or why both probation and jail use is higher in High Use counties. This might also be one area where individual counties behave so differently within segments that patterns are not readily discernible.

C. Local Resources

I measured local resources by looking at per capita income: both per

⁷¹ Criminal Justice Statistics Center, “Data Characteristics and Known Limitations,” 3, available at http://stats.doj.ca.gov/cjsc_stats/prof09/limits.pdf.

capita income itself and the difference from the state per capita income. I note first that I chose not to look at gross population size of a county as a measure of resources. The relationship of Total Population to NFA rates is not statistically significant at the 1 percent level ($p = .089$), the amount that Total Population explains in NFA rates is small ($r^2 = .005$, which means changes in Total Population explain less than .5 percent of the variance in NFA rates), and the standard error is relatively large (root mean squared error (RMSE) = 63.35824. RMSE is a guide to how closely the data fit the trend line).

My figures for per capita income come from the Bureau of Economic Analysis.⁷² These figures do not account for income inequality within a given county, which might be relevant in explaining crime and responses to crime, particularly where property crimes are concerned. I take per capita income as a measure of resources independent of criminal justice budgets. I note also that state criminal justice funding is not necessarily related to per capita income, where poorer counties get more resources.⁷³ Some funding comes from a county's share of state sales tax revenues,⁷⁴ so we might even expect more criminal justice resources in wealthier counties.

Table 12: Per Capita Income by Segment, Average Yearly Values, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
Mean Per Capita Income	\$36,893	\$42,611	\$36,198	\$38,490	\$38,304
Max	\$60,038	\$93,263	\$42,195	\$72,576	\$43,853
Min	\$16,920	\$18,973	\$29,865	\$18,542	\$33,398
Standard Deviation	9,013	15,103	4,313	9,615	3,968

⁷² U.S. Dept't of Commerce, Bureau of Economic Analysis, Local Area Personal Income, available at <http://www.bea.gov/regional/reis/default.cfm?selTable=CA1-3§ion=2>. (Selected "Per Capita Personal Income," "California" and the years 2000-2009.)

⁷³ See footnotes 2-9, *supra* and accompanying text. As a reminder, state funding is also not related to crime rates, either. *Id.*

⁷⁴ See *supra* note 3.

Mean Difference From State Average	-\$1,614	\$4,176	-\$2,195	\$64	N/A
Max Difference	\$22,161	\$49,410	-\$1,528	\$29,336	N/A
Min Difference	-\$17,864	-\$16,498	-\$3,533	-\$18,104	N/A
Standard Deviation	8,374	14,437	523	8,831	N/A

Figures based on county per capita income numbers and were weighted based on county population.

Generally, Low Use counties have higher per capita incomes, approximately six thousand dollars higher than High Use counties and Los Angeles.⁷⁵ All income figures across all segments, however, had a great deal of variation—and the richest group, Low Use, had the highest coefficient of variation. The gap between the highest and lowest reported county incomes for all three segments besides Los Angeles was at least \$40,000, and these same segments had reports of incomes more than \$15,000 below the state per capita income level in a given year and incomes more than \$20,000 above it. Income merits further study; a project which divided the state into income segments might reveal further insights about the relationship between income levels and prison usage.

Table 13: Per Capita Income of High Use Counties, Average Yearly Values, 2000-2009

	High Coverage	High Subsidy	Rich Four	Poor Four	High Coverage and Subsidy
Mean Per Capita Income	\$27,089	\$37,567	\$47,484	\$27,481	\$27,872

⁷⁵ These numbers were calculated in order to account for county population size. I took per capita income in a given county for a given year, then multiplied that number by the county's population that year. I added these figures for a given segment of the state, then divided by total population for that segment. Figures were not adjusted for inflation.

Max	\$40,721	\$60,038	\$60,038	\$31,111	\$34,432
Min	\$18,021	\$21,517	\$33,307	\$21,517	\$16,920
Mean Difference From State Average	-\$11,319	-\$945	\$9,057	-\$11,118	-\$10,593
Max Difference	-\$1,674	\$22,161	\$22,161	-\$8,123	-\$6,699
Min Difference	-\$17,864	-\$13,828	-\$617	-\$13,828	-\$17,455

Figures based on county per capita income numbers and were weighted by county population.

In Table 13, we see that there is a sharp divide between the Rich Four and the Poor Four. Three of the Rich Four counties were above the average state per capita income every year in the study; Santa Barbara was below it during only three years, and even then missed it by no more than \$617. The Poor Four, however, were at least \$8,000 below the average state per capita income level every single year. The best a poor county did relative to the state average was still more than \$7,000 less than the worst a rich county did—and almost thirty thousand dollars less than the highest Rich Four figure. The mean difference between the two groups was approximately \$20,000 a year. The Rich Four are, in fact, the only above-average income group of High Use counties—neither high coverage nor high coverage/high subsidy counties ever broke above the state average per capita income level for even a single year. I should note, again, that the Rich Four have large total populations, with around fifty percent of the High Use segment's population. I also note that none of these figures accounts for income differences within a county; counties undoubtedly have richer and poorer areas.

Table 14: Per Capita Income of Low Use Counties, Average Yearly Values, 2000-2009

	Low Six	High Five	Low Use Without San Francisco and Marin
Mean Per Capita Income	\$33,086	\$52,295	\$39,800
Max	\$47,813	\$93,263	\$58,228

Min	\$18,973	\$39,013	\$18,973
Mean Difference From State Average	-\$5,395	\$13,900	\$1,360
Max Difference	\$4,573	\$49,410	\$14,375
Min Difference	-\$14,425	\$4,880	-14,425

Figures based on county per capita income numbers and were weighted by county population.

Low Use counties, again, do not divide as easily as High Use ones. This chart looks only at the group of eleven counties with both low coverage and low subsidies, and excludes Alpine, San Benito, and San Diego (as well as Los Angeles, as stated earlier). There are four Low Use counties which never had incomes above the state per capita average during any year of the study, but an even division of this segment by population adds two counties with above-average incomes. The mean difference between the two groups is nearly \$20,000, but this segment is made up mostly of average counties with two outliers: Marin County and San Francisco. Recalculating the mean per capita income of the segment without Marin County and San Francisco gives a mean per capita income of \$39,800, approximately \$1500 higher than the state average for this period. While this number is still above the state average, and still above that of the other three segments, it is lower than the mean income of the Rich Four.

D. Politics

I looked at voter registration numbers for my political analysis. Voter registration data came from the California Secretary of State.⁷⁶ I used the

⁷⁶ The entry page for the Voter Registration and Participation Statistics is available at http://www.sos.ca.gov/elections/elections_u.htm. Specifically, I used these particular reports: Report of Registration as of February 7, 2000, available at <http://www.sos.ca.gov/elections/ror/ror-pages/29day-presprim-00/county.pdf>; Report of Registration as of February 10, 2001, available at <http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-01/county.pdf> [NOTE: Sierra County is reported as having more than 100 percent of its population registered to vote]; Report of Registration as of February 4, 2002, available at <http://www.sos.ca.gov/elections/ror/ror-pages/29day-prim-02/county.xls>; February 10,

date closest to February for years with multiple reports; this is because odd-numbered years only have a single registration report, which comes out in February. I collected percentage data on total registration, Democratic and Republican registration, and declined to state (as a proxy for swing voters). I calculated third party registration by taking these three numbers and subtracting them from 100; this procedure, admittedly, amalgamates third parties of very different political stripes and should be read as a measure of anti-two-party sentiment rather than, say, a measure of Green or Libertarian sentiments. I then calculated the political valence of a county by subtracting the percentage of Republicans from the percentage of Democrats, yielding positive numbers for Democratic majorities and negative numbers for Republican majorities.

I used registration data, rather than actual voting patterns, for a number of reasons. First, I was wary of including data from actual races out of the concern that individual candidates and/or issues might shift turnout one way or another. Second, the data are less readily available. Registration figures might be seen as a general measure of civic engagement, and a baseline for individual attitudes, although I acknowledge that there are a variety of opinions expressed on crime within parties, and that party affiliation is in no way a guarantee of left/right tendencies or particular attitudes about crime.⁷⁷

2003 - Report of Registration, available at <http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-03/county.xls>; February 17, 2004 - Report of Registration, available at <http://www.sos.ca.gov/elections/ror/ror-pages/15day-presprim-04/county.xls>; February 10, 2005 - Report of Registration, available at <http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-05/county.xls>; January 3, 2006 - Report of Registration, available at <http://www.sos.ca.gov/elections/ror/ror-pages/154day-prim-06/county.xls>; February 10, 2007 - Report of Registration, available at <http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-07/county.xls>; January 22, 2008 - Report of Registration, available at <http://www.sos.ca.gov/elections/ror/ror-pages/15day-presprim-08/county.xls>; February 10, 2009 Report of Registration, available at <http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-09/county.xls>.

⁷⁷ Of course, it sometimes does indicate something useful. The AB 109 vote in the California assembly, for example, was almost entirely on party lines, with all but one Democrat voting yes, and no Republican voting yes (one member was absent or abstained). See Vote Information, AB 109 Assembly Bill, available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_vote_20110317_0532PM_asm_floor.html. Party affiliations were obtained at the official party websites for the California Assembly. The Democratic site is available at <http://asmdc.org/members/democratic-members>, the Republican site is available at <http://republican.assembly.ca.gov/?p=members>.

I also calculated my figures without correcting for population. I did so because I wanted to evaluate the party identity of a county's political leadership. In other words, this method simulates the electoral college model, where all that matters is who finishes first, not the popular vote model, where the margin of victory also matters.⁷⁸ My state figures are calculated means for the group of 580 counties.⁷⁹

Table 15: Voter Registration by Segment, Average Yearly Values, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
% Registration	70.73%	73.88%	70.97%	73.95%	72.88%
% Democrats	36.79%	46.24%	51.51%	39.27%	40.39%
% Republicans	43.62%	31.16%	26.88%	39.63%	38.60%
Democrats Minus Republicans	-6.83%	15.08%	24.63%	-0.36%	1.79%
Decline to State	14.66%	17.18%	17.04%	15.48%	15.66%
Third Party	4.93%	5.42%	4.57%	5.63%	5.34%

Bold: highest value; *Italics:* lowest value. All figures are not corrected for population; they are means of the group of counties for 2000-09.

All segments showed high rates of voter registration, with a bit more registration in Low Use counties. High Use counties had more registered Republicans than other segments of the state, as well as greater numbers of Republicans versus Democrats. This might suggest that higher coverage is more associated with Republican politics. I should

⁷⁸ Consider this thought experiment. If Los Angeles were 99% Democratic and every other county were 51% Republican, popular (population-adjusted) registration numbers would indicate a heavy advantage for Democrats, even though county policies would be under the direction of Republicans in 57 counties.

⁷⁹ Actual state numbers are slightly more Democratic: 70.70% overall, 43.97% Democratic, 34.35% Republican, 9.62% Party Differential, 16.90% Decline to State, 4.79% Third Party.

caution, however, that my analysis is not comprehensive enough to support more than a tentative observation. Two of the Rich Four counties are Democratic, for example, and Nevada, which has an extremely low percentage of its population in prison, is Republican.

Intra-county distribution might affect policy, in that a county might have Democratic cities within counties, or particular seats on the county council. Slates for county officials specify not just party, but person, and individual differences on criminal justice might account for some of the observed results. Finally, individual county council seats are drawn within counties and might heighten the effects of how Democrats and Republicans are distributed within the county.⁸⁰

E. Reverse Causality: Is Low Crime the Product of a High NFA?

In this Part, I consider whether I have been analyzing the problem backwards. I have analyzed whether prison is a product of crime. Perhaps, though, crime is a product of prison. That would mean the low crime rates associated with high NFA are an indicator that prison works. Under this theory, because offenders in High Use counties are subject to swift and certain punishment, this means both that there are fewer of them left to offend (incapacitation) and that any remaining offenders are less likely to risk prison (deterrence). I will not attempt to determine whether changes in prison are, in fact, the cause of changes in crime, not the other way around, but I note that this is the subject of vociferous—and voluminous—academic debate.⁸¹

I will, instead, frame the problems in terms of the central question of this paper, a question which provides a transition to the next section of the Paper, Fiscal Implications. Even if one were to assume that the causation

⁸⁰ For an evaluation of the role of party politics in sentencing commissions, see Rachel Barkow and Kathleen O'Neil, "Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation," 84 Texas Law Review 1973 (2006).

⁸¹ See, e.g., William Spelman, Specifying the Relationship Between Crime and Prisons, 24 J. Quant. Criminol 149 (2008) (surveying several quantitative studies and finding that, "[d]espite many years of study, the effect of prisons on crime remains a controversial question."). For a more accessible introduction to this controversy, see The Pew Center on the States, The Impact of Incarceration on Crime: Two National Experts Weigh In, April 2008, available at <http://www.pewcenteronthestates.org/uploadedFiles/Crime%20Incarceration%20QA.pdf>.

in fact runs from prison to crime, then why should the state pay for it? The choice is made in the county and the benefits go to the county. If the policies are, in fact, effective, then the counties should be happy to pay for it. If the state pays for it because it believes the policy is worth subsidizing, which counties should it pay for? Can it afford to subsidize High Use rates for all counties? Should it subsidize just prison, or should it subsidize other policy choices as well? I discuss these and other issues in the following section, which discusses the state's role in funding prisons.

IV. FISCAL IMPLICATIONS

This Part examines the fiscal ramifications of the state prison subsidy. Given that the state pays for prison, and that counties use prisons at different rates, what is the net prison subsidy (or tax) for counties? I have adverted to the idea of subsidy, without mentioning the numbers. This Part details exactly what those numbers are. In addition to exploring what is, I also calculate what might be if the state emulated the High Use counties or the Low Use ones. I calculate statewide figures by adjusting the state's coverage rate to each segment's coverage rate. I also calculate what would happen if a single segment moved to another segment's coverage rates. There we see that if just Los Angeles County moved to a High Use coverage rate, for example, the fiscal impacts would be substantial.

A. Subsidy by Segment

The following table calculates prison subsidies in the manner described earlier.⁸² I multiplied the coverage rate by the number of violent crimes in a segment to come up with the “fair” or “justified” NFA number. I then subtracted this number from actual NFA and multiplied the result by per capita prison costs to arrive at the subsidy (or tax). I also calculated the subsidy on the basis of property crime coverage and Part I coverage, to see if an NFA rate not justified on the basis of violent crime might be justified on some other measure of crime.

Table 16: Prison Subsidy by Segment, Average Yearly Values, 2000-2009

	High Use	Low Use	Los	Middle	State Total
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⁸² See *infra* at 11-12.

			Angeles	Use	
NFA	17,028	8,311	13,888	5,045	44,272
Coverage	35.90%	14.60%	18.78%	27.58%	22.52%
Violent Crime	47,427	56,929	73,956	18,293	196,604
NFA if at State Coverage Rate	10,734	12,982	16,406	4,150	N/A
Excess NFA	6,294	-4,671	-2,518	895	N/A
Average yearly Subsidy (millions)	\$210.05	-\$166.30	-\$72.73	\$28.97	N/A
Highest Individual Yearly County Subsidy (Millions)	\$68.78	\$5.23	\$.97	\$12.92	N/A
Lowest Individual Yearly County Subsidy (Millions)	-\$32	-\$85.90	-\$145.04	-\$5.79	N/A
Property Coverage Subsidy (millions)	\$122.10	-\$201.64	\$64.86	\$14.67	N/A
Part I coverage Subsidy (millions)	\$126.40	-\$208.52	\$75.70	\$6.41	N/A

Bold: highest value; *Italics:* lowest value. All figures are gross numbers. High and Low Subsidy figures refer to individual counties within the respective groups.

California pays an immense amount of money to subsidize the prison usage of High Use counties that is not justified by violent crime, an average of \$210 million a year. Individual counties used huge sums of state resources: San Bernardino's prison use was subsidized an average of \$51 million a year, with a high of almost \$69 million in 2006. These figures, again, only calculate the cost of the first year of imprisonment of NFA for that particular year, and only for the number of NFA exceeding

that justified by the statewide coverage rate. During the ten years of the study, only one of the eighteen High Use counties had a negative subsidy. Fresno had a single year (2000) in which its prison usage was not subsidized (-\$320,000). Fresno's excess prison usage cost an average of more than \$15 million a year between 2000 and 2009.

Low Use counties left millions of dollars of prison resources on the table. If they had incarcerated at the statewide coverage rate, they would have used, on average, an extra \$166 million in prison resources a year. The difference between the cost of High Use deviations from the state average and Low Use deviations is more than \$375 million a year, a tremendous transfer of resources from one-third of the state to another. Individual Low Use counties forewent huge amounts of crime-justified prison resources. Alameda County used an average of \$48 million dollars less than its justified amount, with a high (or low) of -\$85 million in 2008. (Again, this estimate only includes the first year's cost of a new felon admission.) Estimates of Low Use counties as a segment are somewhat dampened by the inclusion of San Diego, which was in the *top* quartile for subsidies for two years (though its average annual subsidy was -\$8.5 million).

Los Angeles County was also on the losing end of the prison subsidy, averaging a -\$72 million subsidy for the ten years of the study. Los Angeles spent the first five years of the past decade in the -\$100 million range, hitting a peak of -\$145 million in 2003 before dropping to -\$96 million in 2004. The rest of the decade saw the Los Angeles subsidy numbers increase as Los Angeles's coverage rates increased, a product both of decreasing violent crime and increased NFA. Los Angeles had a positive net subsidy of \$970,000 in 2009.

The Middle Use counties were subsidized overall, and I note again the heterogeneity of the group. More than half of the Middle Use counties were subsidized in 9 or more years of the study.⁸³

Table 16 also calculates subsidies according to alternative coverage rates. If prison is justified for more than just violent crime, are the subsidy numbers different? The answer depends on which segment of the

⁸³ Amador, Del Norte, Mariposa, San Luis Obispo, Siskiyou, and Tulare were subsidized in 9 of the 10 years; Humboldt, Madera, Tuolumne, Ventura, Yolo and Yuba were subsidized all ten years.

state one looks at. High Use counties look a little less high use when coverage is calculated using either reported property crimes or reported Part I crimes. Their subsidy drops to a yearly average of about \$122 million, a little more than \$70 million less than the yearly violent crime subsidy. Low Use counties, however, see their prison resource shortfall grow, dropping to below \$200 million. These numbers can be explained by reference to the relatively high property and Part I crime rates in both High and Low Use counties. High property and Part I crime justifies more of the High Use counties' NFA and increases the amount of prison resources left unused by the Low Use counties.

Perhaps the most interesting result of recalculating coverage by property and Part I crime, though, is that Los Angeles goes from being a net donor to a net recipient of unjustified prison resources. Remember, Los Angeles County's NFA rate is high on a straight per capita basis—it is low only when adjusted for its high violent crime rate. Because Los Angeles does not suffer from relatively high property and Part I crime, however, its high NFA rate is no longer justified when adjusted for these types of crime, and its property and Part I coverage rates are, accordingly, higher than the state average. Once again, the measure of subsidy is ultimately a normative question: what prison admissions are justified, and on what basis?

Table 17: Prison Subsidies for High Use Counties, Average Yearly Values, 2000-2009

	High Coverage	High Subsidy	Rich Four	Poor Four	High Coverage and Subsidy
Average Raw NFA Numbers Per Year	329	15,284	5,491	9,793	1,415
Coverage	54.61%	34.45%	33.72 %	34.88 %	57.46%
Violent Crime Raw Numbers	603	44,361	16,284	28,077	2,463
NFA if at	138	10,030	3,674	6,357	566

State Coverage Rate					
Excess NFA	191	5,254	1,817	3,436	849
Average yearly Subsidy (millions)	\$6.36	\$175.37	\$60.85	\$115.52	\$28.32
Highest Individual Yearly Subsidy (millions)	\$3.84	\$68.78	\$55.39	\$68.78	\$13.71
Lowest Individual Yearly Subsidy (millions)	\$.01	-\$32	\$1.16	-\$32	\$1.25
Property Coverage Subsidy (millions)	\$5.81	\$91.29	\$28.27	\$63.02	\$25.00
Part I coverage Subsidy (millions)	\$5.95	\$92.84	\$17.37	\$75.48	\$24.71

Bold: highest value; *Italics:* lowest value. All figures are gross (non-normalized) numbers. High and Low Subsidy values are for individual counties within the respective groups. Figures might not add due to rounding.

Table 17 takes a closer look at just the subsidized counties. The Poor Four dominate here, sending, in an average year, 3,436 excess new felons (those sent above the number calculated at the state coverage rate). These prisoners cost an average of \$115 million in just the first year of their incarceration, and the Poor Four incur this cost every year. The Rich Four, however, also cost the state large sums of money on the NFA they send above the state coverage rate. Two rich counties in particular receive large subsidies: Santa Clara and Orange, which received eight

digit subsidies each year, an average of more than \$16 million for Santa Clara and \$36 million for Orange. The state pays for these extra prisoners, even though the citizens in the counties who sent them make, on average, no less than \$4,000 more than the average Californian.

B. Recalculating State Coverage Rates by Segment

What would happen if other segments of the state began acting like one another? I consider a variety of scenarios. First, I calculate what would happen if the state coverage rate were replaced with the coverage rate of each of the four segments. Even though the resulting figures include only the cost of the first year of each new felon's sentence, the results would be dramatic, ranging from an additional cost of \$890 million to a cut of more than half a billion dollars. Second, I calculate what would happen if only individual segments of the state changed their coverage rates. This analysis shows that changing just parts of California could have profound fiscal impacts.

Table 18: Subsidy Recalculated with Changed Statewide Coverage Rate, by Segment, Average Yearly Values, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
Coverage	35.90%	<i>14.60%</i>	18.78%	27.58%	22.52%
State NFA if at Segment Coverage Rate	70,590	28,703	36,919	54,221	44,272
Excess NFA	26,318	-15,569	-7,353	9,949	N/A
Change in Cost (millions)	\$890.14	-\$526.58	-\$248.72	\$336.51	N/A

Bold: highest value; *Italics:* lowest value. All figures are gross numbers. High and Low Subsidy values are for individual counties within the respective groups.

One thing is immediately apparent from Table 18: the state cannot afford for all counties to act like High Use counties. If the state incarcerated at the High Use coverage rate, it would cost an additional \$890 million each year for just the first year of new felons' sentences. The state would also have to find room in its already overcrowded prisons

to house an additional 26,318 incoming prisoners each year. The state could, however, shed an average of more than 15,000 inmates if it adopted Low Use coverage rates statewide. In doing so, it would save more than \$500 million in the cost of the first year of new felons' sentences.

Table 19: Subsidy with Changed Segment Coverage Rate, by Segment, Average Yearly Values, 2000-2009

	High Use	Low Use	Los Angeles	Poor Four	Rich Four
Segment Changes to High Use Coverage Rate	N/A	\$410.23	\$420.40	N/A	N/A
Segment Changes to Low Use Coverage Rate	-\$341.75	N/A	-\$104.52	-\$192.59	-\$105.31
Segment Changes to Los Angeles Coverage Rate	-\$274.72	\$80.46	N/A	-\$152.90	-\$82.29
Segment Changes to Middle Use Coverage Rate	-\$133.55	\$249.92	\$220.14	-\$69.33	-\$33.82
Segment Changes to State Average Coverage Rate	-\$214.73	\$152.48	\$93.56	-\$117.38	-\$61.69

Even if the state were not to change as a whole, just changing a segment of the state—or just the Rich and Poor Four—could have significant impacts on prison space and prison budgets. If the High Use counties changed their coverage rates to the state average, the state would immediately save an average of more than \$214 million a year (plus the amounts from future sentence years of foregone NFA). If the Poor Four alone changed to the state average, the state would save \$117 million. In fact, if the Poor Four adopted the coverage rate of any of the other

segments (besides the Rich Four), the state would save millions of dollars and thousands of prison beds. Alternatively, if the Low Use counties—or just Los Angeles County—begin to emulate the High Use counties, the state is in for even higher prison budgets, more than \$400 million to cover the first year of new felon sentences alone.

With this diagnosis, what can California do to change coverage rates and prison usage, or at least to account for them? The next section sketches out some answers to that question.

V. POLICY IMPLICATIONS

California faces many challenges relating to its overcrowded prisons. Once we understand that California's counties are different when it comes to prison use, what are the policy implications? What would happen if California's policymakers understood that counties are different—and that a county's use of prison might be the result of policy choices, not responses to crime? What effect would it have on policies to promote prison population reductions? I examine three possibilities: realignment, probation subsidies, and sentencing.

A. *Realignment, Prisoner Release*

California must cut its prison population by approximately 37,000 inmates⁸⁴ within the next two years⁸⁵ or federal courts will order it to release prisoners. Recently, the California Assembly passed legislation to “realign” criminal justice, shifting more responsibilities from the state to counties.⁸⁶ The program is in limbo while it awaits funding, but it is clearly the direction the state is headed in. As the state moves to redefine its relationship to the counties, the county analysis in this Article might be useful in blunting the criticism that the state is pushing its problem onto the counties. With High Use counties, the state is simply returning the problem to those counties. The state has thusfar given no indication that it will attempt to tailor realignment to individual counties, but ideally, it would tailor its responses to High and Low Use counties, and demand more of the former than the latter.

⁸⁴ Brown v. Plata, 563 U.S. ___, slip op. at *3 (2011).

⁸⁵ *Id.* at 45. The Supreme Court did, however, strongly hint that the three-judge panel should extend the timeline if the state requests it. *Id.* at 46-47.

⁸⁶ See *supra* notes 5-9 and accompanying text.

A second way this analysis might help is in the implementation of realignment, particularly when it comes to setting benchmarks of current versus desired prison usage. As I have stated, the prison usage per capita—whether total prison population or NFA—is too crude a measure. Tying prison population to current usage would merely lock in the existing subsidy, rewarding (in perpetuity) counties which choose prison—and not other options—as a response to crime. In some ways, in fact, tying benchmarks for new reforms to existing prison usage is ironic: it treats overcrowding by rewarding those counties most responsible for it. Yet a bill passed in May to reimburse counties for building local jail facilities would “give funding preference to counties that committed the largest percentage of inmates to state custody in relation to the total population of CDCR in 2010.”⁸⁷ Using per capita prison usage does not eliminate the prison subsidy, it merely shifts it to another part of the ledger.

The state should, instead, tie realignment benchmarks to the violent crime coverage rate. This would allow for flexibility in letting counties imprison greater numbers in response to local outbreaks of reported violent crime, while tying state subsidies for prison usage to its most persuasive justification: crime. Violent crimes are readily reported, and because higher crime rates are political poison, counties have disincentives to game them. It is unlikely that localities would risk the political discontent from rising crime rates in order to reserve more prison resources for themselves.

Finally, one thing that has gotten lost in the realignment discussion—and in this Article—is the relative size of the county and state in criminal justice. Prison subsidies figures are sizeable, but they are dwarfed by local criminal justice budgets. I added statewide budget figures for local law enforcement (sheriffs and police), jail, and probation to get an approximation of the amount of money spent locally on criminal justice—though these figures in particular do not include the budget for the county’s chief law enforcement official, the District Attorney. I then

⁸⁷ The bill, known as AB 94, was passed in May 2011 but will only go into effect once the state funds it. The full text and history of the bill is not yet on the major research services; however, the state’s electronic version of the bill is available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0051-0100/ab_94_bill_20110510_chaptered.html. The quoted text comes from Govt. Code § 15820.917 (b) (2011).

added a county's imputed gross prison budget (total prison population times per capita prisoner cost) to these budget figures. The result gives a total measure of county criminal justice costs. Prisons are only one quarter of this total amount. Counties have, on average, three times the criminal justice resources available in-county that the state spends on its behalf for imprisonment. Prisoners in state facilities are not the largest part of county criminal justice. They never have been. I say this only to give the financial concerns about realignment their proper context.

B. De-Subsidizing Prison, Re-Subsidizing Probation

The state could create two incentive mechanisms to encourage High Use counties to lower their coverage rates—and to encourage Low Use counties not to raise theirs. The first would be to decrease the relative cost of in-county dispositions. The second would be to increase the cost of prison usage.

Lowering the cost of in-county dispositions means expanding financial support for diversion programs (such as those aimed at drug abusers or the mentally ill), jail construction, and probation. As noted earlier, jail bed numbers can increase without new construction if counties relied less on bail and released more of the arraigned on their own recognizance.⁸⁸ The state could encourage this—or mandate it—through, *inter alia*, changes to statutes or the uniform bail schedule, by subsidizing the bail bond market, or subsidizing electronic monitoring. The state could also subsidize probation, as, indeed, it did until the mid 1970's.⁸⁹ The state would need to ensure that subsidies kept pace with actual costs to the county, and it could build political will by framing the costs in terms of money saved on inmate costs. Any program must tie funding to measurable outcomes, to ensure that the programs actually reduce the strain on the state's prisons. Otherwise, the state will be spending money without saving it.

The second option, charging counties for surplus prison usage, is more policy neutral. Probation subsidies might encourage an uptake in the gross numbers of people in the criminal justice system (or at least make it more affordable). Charging for prison usage is more narrowly targeted at

⁸⁸ See discussion *supra* at note 64 and accompanying text.

⁸⁹ See, e.g., Kara Dansky, Understanding California Sentencing, 43 U.S.F. L. Rev. 45, 63 (2008).

reducing unjustified use. California actually used capitation fees in its successful drive to decrease the state's youth prison population.⁹⁰ The state charged counties per a rate schedule inverted with the seriousness of offense: the state charged counties a lower day rate to house more serious offenders and a higher day rate to house less serious offenders.⁹¹ The capitation rate policy has not been tried with adult prison populations, however.⁹²

C. State Population Control And Determinate Sentencing

Although I have stated that prison overpopulation is largely a county problem, and, accordingly, that statewide solutions generally miss the mark, I nevertheless have one recommendation for sentencing reform. The difference is that my suggestion is not on the charging side, but on the release side. The state should explore the reintroduction of indeterminate sentences—those terminating in a discretionary parole release decision—on a wider basis as a means of prison population control. In an indeterminate system, the state can release prisoners to parole at times of crowding; determinate sentences means the state has no such leeway. In some ways, then, indeterminate sentencing systems allow the state to push back on county decisions by controlling release decisions. In determinate systems, it can't.

California moved to determinate sentencing in 1975. Before then, the state could control when to release an offender, even though it never controlled who was sent there. Now the state doesn't have any control. The only thing that is a variable is who goes to prison and under what charge they bargained for, both of which are determined long before the state has custody. There is a large amount of discretion with inputs to the prison system—all of it at the county level or below—and none on the state side with release.⁹³

⁹⁰ See, e.g., Little Hoover Comm'n, Juvenile Justice Reform: Realigning Responsibilities 4 (2008), available at <http://www.lhc.ca.gov/studies/192/report192.pdf>.

⁹¹ *Id.*

⁹² See, e.g., Zimring and Hawkins, *supra* note X, at 212 (describing a policy of "surcharging units of local government for additional offenders referred to state prisons" but noting that "we know of no American jurisdiction where this has been seriously proposed or considered.").

⁹³ See *id.* at 211. "Eliminating or reducing the power of parole boards over the release of prisoners removed a significant means of controlling prison population from that level of government responsible for the cost of the prison system."

Of course, I am well aware of the problems with some forms of indeterminate sentencing, as I have demonstrated elsewhere.⁹⁴ I would not support the introduction of fully discretionary, unguided, haphazard indeterminate sentencing. Instead, the state should go one of two ways: setting statewide standards on risk and enforce them system-wide, or to acknowledge the role of community differences and break up the state system entirely. I have already written about the former point;⁹⁵ my next Article takes on the latter.⁹⁶

California is one state; it is also 58 counties. When it comes to criminal justice and the state prison population, localities are where the action is. County criminal justice budgets are much larger than prison budgets, county officials make most of the key decisions, and county responses to crime—not crime itself—drive new felon admission rates. Alameda and San Bernardino are very similar when it comes to criminal justice except in their usage of prison. It is hard to understand why the tax revenues from Alameda's residents should go towards paying for San Bernardino's choices. I am not suggesting that the case cannot be made; I am, however, saying that on the basis of crime, the case has not been made.⁹⁷

I want to emphasize, again, that this study is subject to several limitations. Measuring prison usage in terms of violent crime is a choice I made in designing the study, not a result of it. I have no smoking gun evidence that prison usage is a policy choice; I have only evidence that higher prison usage is not the result of higher crime. Ultimately, the conclusion of this study is that counties are different. The difficult question that remains is which of those differences the state should subsidize, if any.

⁹⁴ See, e.g., See W. David Ball, Normative Elements of Parole Risk, 22 Stan. L. & Pol'y Rev. 395 (2011) (describing California's current parole release system as "less a form of parole release than parole retention."). See also W. David Ball, Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment, 109 Col. L. Rev. 893 (2009).

⁹⁵ See Normative Elements of Parole Risk, *supra* note 88.

⁹⁶ See *supra* note 25.

⁹⁷ Perhaps Alameda receives a greater share of other state resources that evens out with San Bernardino's greater share of prison resources.

Glossary:

APAR—Adult Population at Risk. The subset of a county population between the ages of 18 and 69.

Coverage—NFA as a percentage of violent crime. This is a proxy variable for the degree to which a county responds to crime with incarceration.

High Use—Counties with annual coverage rates and calculated subsidy rates in the top quartile for at least 7 of the 10 years of the study.

High Five—The subset of low coverage/low subsidy counties with relatively high per capita incomes: Alameda, Contra Costa, Marin, San Francisco, and Santa Cruz

Low Six—The subset of low coverage/low subsidy counties with relatively low per capita incomes: Imperial, Nevada, Sacramento, San Joaquin, Sonoma, and Stanislaus.

Low Use—Counties with annual coverage rates and calculated subsidy rates in the bottom quartile for at least 7 of the 10 years of the study.

NFA—new felon admissions, prisoners entering prison upon conviction or plea of a new felony charge. Distinguished from other entrants to the prison system, such as those who have had their parole revoked or parolees admitted with a new term (as a result of a new crime).

Poor Four—The four high-subsidy counties with below-average per capita incomes: Fresno, Kern, Riverside, and San Bernardino.

Rich Four—The four high-subsidy counties with above-average per capita incomes: Orange, Placer, Santa Barbara, and Santa Clara.

Appendix A: List of County Segments

High Use

High Coverage **High Subsidy** **Both**

Colusa	Fresno	Butte
Glenn	Kern	Kings
Inyo	Orange	Shasta
Lake	Placer	Sutter
Lassen	Riverside	
Trinity	San Bernardino	
	Santa Barbara	
	Santa Clara	

Low Use

Low Coverage **Low Subsidy** **Both**

Alpine	(Los Angeles)	Alameda
San Benito	San Diego	Contra Costa
		Imperial
		Marin
		Nevada
		Sacramento
		San Francisco
		San Joaquin
		Santa Cruz
		Sonoma
		Stanislaus

Middle Use

Amador, Calaveras, Del Norte, El Dorado, Humboldt, Madera, Mariposa, Mendocino, Merced, Modoc, Mono, Monterey, Napa, Plumas, San Luis Obispo, San Mateo, Sierra, Siskiyou, Solano, Tehama, Tulare, Tuolumne, Ventura, Yolo, Yuba.

Appendix B: Map of County Segments

